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EDITOR'S NOTE

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o. 85-88-ASX
tatus: GRANTED

Title: Barbara Ann Paulussen, Appellant,
v.
George Ronald Herion

ocketed:
uly 17, 1985

Court: Superior Court of Pennsylvania, Philadelphia Office

Counsel for appellant: Hornik,Esther L.

Counsel for appellee: Stein,Neil H., Onek,Joseph N.

ntry	Date	Note	Proceedings and Orders
1	Jul 17 1985	G	Statement as to jurisdiction filed.
3	Aug 12 1985		Order extending time to file response to juriscictional statement until September 18, 1985.
4	Sep 18 1985		Motion of appellee George R. Herion to dismiss or affirm filed.
5	Sep 18 1985		DISTRIBUTED. October 11, 1985
7	Oct 15 1985		PROBABLE JURISDICTION NOTED.
			**********
8	Nov 27 1985		Joint appendix filed.
9	Nov 27 1985		Brief of appellant Barbara A. Paulussen filed.
11	Nov 27 1985	G	Motion of Children's Defense Func, et al. for leave to file a brief as amici curiae filed.
12	Dec 9 1985		Motion of Children's Defense Func, et al. for leave to file a brief as amici curiae GRANTED.
13	Nov 29 1985	G	Motion of Neighborhood Legal Services Association for leave to file a brief as amicus curiae filed.
14	Dec 12 1985	D	Motion of Children's Defense Func, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
15	Dec 16 1985		Motion of Neighborhood Legal Services Association for leave to file a brief as amicus curiae GRANTED.
16	Dec 26 1985		Brief of appellee George R. Herion filed.
17	Dec 27 1985		Opposition of appellant to motion of Children's Defense Fund, et al. for leave to participate filed.
18	Jan 7 1986		SET FOR ARGUMENT, Wednesday, March 5, 1986. (1st case)
19	Jan 7 1986		CIRCULATED.
20	Jan 13 1986		Motion of Children's Defense Func, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
21	Mar 5 1986		ARGUED.

JURISDICTIONAL

STATEMENT

Office-Supreme Court, U.S.
FILED
JUL 17 1985
ALEXANDER L. STEVAS,
CLERK

85-88

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BARBARA ANN PAULUSSEN,

Appellant,

vs.

GEORGE RONALD HERION,

Appellee.

On Appeal from the
Superior Court of Pennsylvania

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a statute of limitation of six years from birth in an action for child support for illegitimate children violates the *Equal Protection Clause of the Fourteenth Amendment,* where there is no equivalent period of limitation for the support of legitimate children?

2. Whether a two year statute of limitation extension for an action for child support against a father who acknowledges paternity violates the *Equal Protection Clause of the Fourteenth Amendment* when there is no equivalent period of limitation for the support of legitimate children?

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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BARBARA ANN PAULUSSEN,

Appellant,

vs.

GEORGE RONALD HERION,

Appellee.

On Appeal from the
Superior Court of Pennsylvania

JURISDICTIONAL STATEMENT

BARBARA PAULUSSEN, the Appellant, appeals from the final order of the Superior Court of Pennsylvania dated October 26, 1984, holding that the statute of limitation regarding paternity actions as set forth at 42 Pa.C.S.A. § 6704(e), now 42 Pa.C.S.A. § 6704(b) does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and affirming the Lower Court decision barring a support action filed on behalf of an illegitimate child. This order was rendered by the highest court in the Commonwealth of Pennsylvania in which such an order could be had. 42 Pa.C.S.A. § 742. On April 21, 1985, the Supreme Court of Pennsylvania denied Appellant's petition for allowance of appeal. Appellant submits this statement to establish that the Supreme Court of the United States has jurisdiction of this appeal and that the appeal presents a substantial constitutional question.

OPINIONS BELOW

The opinion and order of the Superior Court of Pennsylvania is cited at 483 A.2d 892 (Pa. Super 1985). The opinion is printed as Appendix A, pp.a-1 to a-4.

The opinion and order of the lower court, the Bucks County Court of Common Pleas is cited at 42 Bucks County Law Reporter 248 (July 27, 1983). The opinion is printed as Appendix B, pp. a-5 to a-7.

JURISDICTION

The judgment of the Superior Court of Pennsylvania affirming the judgment of the lower court time-barring Appellant from instituting a support action on behalf of her minor illegitimate daughter, Georgeanne Veronica Paulussen, was entered on October 26, 1984. On April 21, 1985, Appellant's petition for allowance of appeal was denied by the Pennsylvania Supreme Court. The Supreme Court of Pennsylvania order denying Appellant's petition for allowance of appeal is printed as Appendix C, p. a-8.

On June 20, 1985, a notice of appeal was filed with the Superior Court of Pennsylvania. This notice of appeal is printed as Appendix D, p. a-9.

This appeal is being docketed within ninety (90) days from the denial of Appellant's petition for allowance of appeal below. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment of the Constitution of the United States provides:

> *"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*

42 Pa.C.S.A. § 6704(e) (repealed) provides:

> "(e) *Limitation of actions* — All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgment by the reputed father."

42 Pa.C.S.A. § 6704(b) provides:

> "(b) *Limitation of actions*— All actions or proceedings to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action or proceeding may be commenced at any time within two years of such contribution or acknowledgment by the reputed father."

STATEMENT OF CASE

On February 17, 1980, Appellant, Barbara Paulussen filed a paternity and child support petition in the Bucks County Court of Common Pleas on behalf of her minor illegitimate daughter, Georgeanne Veronica Paulussen. The petition alleged that Georgeanne had been born out of lawful wedlock on March 5, 1972, that George Ronald Herion was Georgeanne's natural father and that George Ronald Herion ceased making contributions to Georgeanne's support in April of 1975.

On April 7, 1980, Appellee, George Ronald Herion filed preliminary objections to the paternity and support petition. These preliminary objections raised the time-bar of the Pennsylvania statute of limitation for paternity actions, 42 Pa.C.S.A. § 6704(e). Appellant responded to the preliminary objections by raising the issue of the constitutionality of the Pennsylvania statute of limitation for paternity actions in her answer filed on April 23, 1980. Thereafter, the Bucks County Court of Common Pleas entered an order overruling George Ronald Herion's preliminary objections and granting him leave to file an answer to the original child support complaint. Herion duly filed an answer denying the paternity of Georgeanne and admitting that his financial contributions to her support ended in April of 1975. The bar of the Pennsylvania statute of limitation for paternity was raised in the new matter portion of his answer. Appellant's reply to new matter again challenged the constitutionality of the Pennsylvania statute of limitation. After the pleadings were closed, both parties proceeded with discovery including blood tests for Barbara Paulussen, George Ronald Herion, and Georgeanne Veronica Paulussen. The case was listed for trial on October 28, 1982.

On the eve of trial, Appellee's counsel contacted Appellant's counsel by telephone and offered to have his client sign a stipulation acknowledging that he was the father of Georgeanne Paulussen with the condition that this acknowledgement of paternity would not prejudice his rights to raise the statute of limitation defense on appeal. In return for this stipulation of acknowledgement, Barbara Paulussen would waive her right to proceed to trial on the paternity issue. On February 28, 1983, the lower court judge refused to allow the filing of stipulations in this matter. Thereafter, the parties cross-filed motions for summary judgment. The sole basis for the reputed father's Motion for summary judgment was that mother had filed the support action for Georgeanne more than six years from the date of her birth and more than two years since the last support payment. The Appellant filed her motion for summary judgment on the basis that the Appellee's proposed stipulation of acknowledgement of paternity was a "fresh" written acknowledgement which tolled the Pennsylvania statute of limitation for another two years and in the alternative, the motion for summary judgment challenged the constitutionality of the Pennsylvania statute of limitation as a violation of Georgeanne's rights to equal protection under the laws of the Commonwealth of Pennsylvania.

In an affidavit in support of her Motion for Summary Judgment, the mother averred the following:

Herion had been Barbara Paulussen's exclusive relationship at the time of Georgeanne's conception; he had accompanied Barbara Paulussen to appointments with her obstetrician during her pregnancy; Herion had paid the hospital bill after Georgeanne was born; Herion had been named as Georgeanne's father on both her birth certificate and baptismal certificate; Georgeanne and a daughter born in wedlock to Herion had identical congenital hip defects, and blood test results would be introduced into evidence that would indicate that there was a 99.80 percent probability that George Herion was Georgeanne's father.

On June 8, 1983, the lower court denied Appellant's motion for summary judgment and granted Appellee's motion for summary judgment. The result of judgment in favor of Appellee was that Barbara Paulussen's petition on behalf of her daughter was dismissed. Appellant's petition for reconsideration and vacation of the order was dismissed. The matter was then appealed to the Superior Court of Pennsylvania.

On October 26, 1984, the Superior Court of Pennsylvania found that Appellant, Barbara Paulussen's support action on behalf of Georgeanne was clearly time-barred by the Pennsylvania paternity statute of limitation. The *Paulussen* court at 483 A.2d 894, acknowledged that the Pennsylvania statute of limitation "results in imposing a greater impediment to the illegitimate child's claim for support." However, at 483 A.2d 894, the *Paulussen* court found that there is no constitutional violation

because "....it [the statute] is substantially related to a legitimate state interest in preventing the litigation of stale or fraudulent claims." 483 A.2d 894 [citations omitted].

On November 23, 1984, Appellant filed a petition for allowance of appeal in the Supreme Court of Pennsylvania. Her petition was denied on April 21, 1985, and this appeal to the Supreme Court of the United States now follows.

STATEMENT OF REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

Plenary consideration of the constitutionality of the Pennsylvania six year statute of limitation in paternity action is required for the following reasons:

The number of illegitimate children born in this country is rapidly increasing. The constitutionality of statutes of limitation affecting the rights of illegitimate children has been seriously questioned by the majority of this Court. Various states have reached inconsistent results regarding the constitutionality of statutes of limitation for paternity actions.

The class of illegitimate children whose rights are potentially affected by statutes of limitation on paternity action is growing rapidly. In 1950, the total percentage of births of illegitimate children as compared to legitimate children was four percent (4%). By 1970, the percentage of illegitimate children had increased to ten point seven percent (10.7%). By 1980, the percentage stood at eighteen point four percent (18.4%). U.S. Department of Commerce, *Statistical Abstract of the United States,* Table 97, p.70. Therefore, because of the numbers of children involved, it is of great national importance that this question be decided by this Court.

In recent years, this Court has struck down two state statutes of limitation which were presented to it for review. In *Mills v. Habluetzel,* 456 U.S. 91 (1982), in a plurality opinion, this Court struck down a Texas paternity statute of limitation of one year as a denial of equal protection to illegitimate children. In a concurring opinion to *Mills,* Justice O'Connor, joined by the

Chief Justice, Justice Brennan and Justice Blackmun, and Justice Powell's concurrence on judgment, states at 406 U.S. 102, that the reason for writing a separate opinion was because "... I fear that the opinion may be misinterpreted as approving the four-year statute of limitation now used in Texas."

In *Pickett v. Brown,* 462 U.S. 1, this Court unanimously struck down a two year paternity statute of limitation from Tennessee as a violation of the equal protection rights of illegitimate children. The specific concerns regarding the constitutionality of a statute of limitation in paternity actions that were stated in the *Mills* concurring opinion were extensively cited and quoted by the *Pickett* Court.

The primary justification for state statutes limiting the time for illegitimate children to institute support actions against their alleged fathers is that these limitations are necessary to prevent the litigation of stale and fraudulent claims.

The Court in *Pickett,* at 462 U.S.1, recognized that there are strong countervailing interests as well. A state has an obligation to promote justice by facilitating the adjudication of the rights of illegitimate children with genuine claims against their fathers for support. The state has an interest in its fiscal integrity. Often when an illegitimate child cannot obtain support from his father, the support must come from a state welfare agency, thereby draining the state's limited resources. The likelihood of false accusations and fraudulent claims has also been substantially reduced by sophisticated blood tests that can screen out over ninety-five percent (95%) of reputed fathers. Because of these blood test results, the class of fathers who would be subject to fraudulent claims is quite limited.

The burden of proof in a paternity action remains on the persons bringing the action on the behalf of the illegitimate child. The passage of time which results in the difficulty of producing fresh evidence and fading memories of witnesses is shared by both parties in a paternity action. This Court was also concerned that statutes of limitation in paternity actions discriminate against illegitimate children because in many states a statute of limitation in civil cases will be tolled during the minority of the plaintiff.

Both *Mills* and *Pickett* were considered by the Pennsylvania Supreme Court when *Astemborski v. Susmarski,* 502 Pa. 409,

466 A.2d 1018,(1983) was remanded to it by this Court after a Writ of Certiorari had been granted. The Pennsylvania Supreme Court held that the Pennsylvania six year statute of limitation did not violate the Equal Protection Clause of the United States Constitution. The Pennsylvania Supreme Court at 502 Pa. 418, 466 A.2d 1022, acknowledged that ".... the statute may operate as it has in this case, to deprive an illegitimate child of its right to make a claim for support beyond the six year limit." Notwithstanding this injustice to illegitimate children, the Pennsylvania Supreme Court found that six years from the date of birth was a sufficient time for anyone to bring an action for paternity on behalf of an illegitimate child. The Pennsylvania Court did not specifically address the problems of the conflict of interest between an illegitimate child's mother and the illegitimate child. This conflict of interest can create an impenetrable psychological barrier to the institution of a timely paternity action by the mother on behalf of the child. In the concurring opinion in *Mills,* at 456 U.S.105-106, it is stated as follows:

> "Finally, the practical obstacles to filing suit within one year of birth could as easily exist several years after the birth of the illegitimate child. For example, if, because of the continuing relationship between the natural father and the mother, the father has provided the child with financial support for several years, the mother understandably would be unlikely or even unwilling to jeopardize her relationship with the child's father by filing a paternity suit in order to protect her child's right to financial support at some indeterminate future date. Alternatively, the child may have lived with the father alone or his relatives for a number of years, a situation that leaves the child obviously unable to sue his father to establish paternity. The risk that the child will find himself without financial support from his natural father seems as likely throughout his minority as during the first year of his life.

II

A review of the factors used in deciding that the one year statute of limitation cannot withstand an equal protection

> challenge indicates that longer periods of limitations for paternity suits also may be unconstitutional."

There is an implicit presumption in the Pennsylvania statute of limitation on paternity actions that the mother of an illegitimate child will act in the illegitimate child's best interest. If the mother fails to institute a timely paternity action, the child's rights are forever barred. In *Astemborski,* at 502 Pa. 416-417, note 3, 466 A.2d 1021-1022, note 3, the Pennsylvania Supreme Court specifically notes that the two year extension of the six year limitation period to allow an action to be instituted two years after a father's last acknowledgement of his child further supports the constitutionality of the paternity statute of limitation. This two year extension does not make the Pennsylvania statute constitutional as this Court has already ruled in *Pickett, supra.* that a two year statute of limitation in paternity is not constitutional.

Another concern regarding the constitutionality of the statute which was not raised by the Supreme Court in either *Mills* or *Pickett* is that a minor child's need for support continues throughout his minority. Since his claim is fresh for a period of eighteen years, it does not seem appropriate to limit the institution of an action to recover for this eighteen year obligation to the first six years of the child's life.

This Court must decide whether a statute of limitations in a paternity action is constitutional, as there is a great inconsistency in several states decisions considering paternity statute of limitation with provisions similar to the Pennsylvania statute of limitation. For example, the constitutionality of such statutes of limitation was upheld in Pennsylvania [*Astemborski v. Susmarski,supra,* 6 year statute] and Michigan [*Daniel v. Collier,* 130 Mich. App. 345, 343 N.W.2d 16 (1983) 6-year statute and *Shifter v. Wolf,* 120 Mich.App. 182, 327 N.W.2d 429 (1982)]; Alabama [*Morgan County Dept. of Pensions ex rel. Ryan v. Kelso,* 460 So.2d 1333 (Ala. Civ. App. 1984), 5-year statute]. States which have held that statutes of limitation for paternity actions are unconstitutional include North Carolina [*County of Lenoir ex rel. Codgell v. Johnson,* 46 N.C.App. 182, 264 S.E.2d 816 (1980)]; Florida [*State Dept. of Health & Rehabilitation Services* on behalf of *Gillespie v. West,* 378 So.2d 1220 (1979)]; New Mexico [*Stringer v. Dudoich,* 92 N.M.98,

583 P.2d 462 (1978)]; Oregon [*State ex rel. Adult and Fam. Serv. v. Bradley,* 58 Or.App. 663,650 P.2d 91 (1982), 1-year]; Indiana [*Matter of M.D.H.,* 437 N.E.2d 119 (Ind. App. 1982)]; District of Columbia [*District of Columbia ex rel. W.J.D. v. E.M.,* 467 A.2d 457 (D.C. App. 1983)]; Illinois [*Dornfeld v. Julian,* 104 Ill.2d 261,472 N.E.2d 431 (1984) 3-year statute]; New York [*Matter of Patricia R. v. Peter W.,* 126 Misc.2d 87,480 N.Y.S.2d 1020 (1983)]; and Oklahoma [*Callison v. Callison,* 687 P.2d 106 (Okla. 1984), 3-year statute]; Kentucky [*Com. Ex rel. Lepard v. Young,* 666 S.W.2d 735 (Ky. 1983)]; and Maryland [*Frick v. Maldonado,* 296 Md. 304, 462 A.2d 1206 (1983) 2-year statute].

States that have statutes that allow illegitimate children to institute paternity actions throughout their minority and sometime for a limited period afterward, include Massachusetts [*Com. v. Gruttner,* 385 Mass. 474, 432 N.E.2d 518 (1982)] and Hawaii [*Doe v. Roe,* 677 P.2d 468 (Hawaii 1984)].

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

CERTIFICATION IN ACCORDANCE WITH SUPREME COURT RULE 28.4 (C)

Because the constitutionality of a state statute is drawn into question, 28 U.S.C. Section 2403 (b) may be appliacable.

Respectfully submitted,

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Dated: July, 1985

APPENDIX A

483 A. 2d 892 (Pa. Super. 1984)

BARBARA ANN PAULUSSEN,

Appellant,

vs.

GEORGE RONALD HERION,

Appellee.

SUPERIOR COURT OF PENNSYLVANIA

ARGUED JULY 24, 1984
FILED OCTOBER 26, 1984

ROSALIE DAVIES, Narberth
for appellant.

FRANCIS M. VISCO, Philadelphia
for appellee.

OPINION

Before CIRILLO, MONTEMURO and CERCONE, JJ.

CIRILLO, Judge:

This is an appeal from and order of the Court of Common Pleas of Bucks County in which the motion for summary judgment of the appellee George Ronald Herion was granted and that of the appellant Barbara Paulussen was denied. On March 5, 1980 the appellant filed a petition for support on behalf of her minor child, Georgeanne Veronica Paulussen, born March 5, 1972. The petition set forth that the appellee as the natural father had failed to support the child from April, 1975 to the present. The appellee filed an answer and new matter, denying paternity and admitting the fact that financial support had ceased in April, 1975. After consideration of the briefs filed by both parties, the court granted the appellee's motion for summary judgment. Shortly thereafter, a petition for reconsideration and vacation of the order was filed and subsequently dismissed. This appeal followed.

On appeal, the appellant challenges the constitutionality of 42 Pa. C.S. § 6704(e), now 6704(b), which imposes a limitation period on actions to establish paternity, as violative of equal protection, of the prohibition against special laws, and of the Equal Rights Amendment. Futher, the appellant asserts that since the appellee has openly acknowledged his paternity by contributing support, by failing to contest the presence of his name on the birth certificate, and by admitting paternity in a stipulation, he is thereby estopped from raising the statute of limitations. We find no merit in the appellant's position and affirm the order of the court.

[1,2] In response to the appellant's challenge to the constitutionality of the statute of limitations requiring that actions to establish paternity of a child born out of wedlock be commenced within six years of the birth of the child, 42 Pa. C.S. § 6704(e), we rely upon *Astemborski v. Susmarski,* 502 Pa. 409, 466 A.2d 1018 (1983):

> To be sustained on equal protection grounds, therefore, a statute of limitations governing assertion of paternity

> claims must satisfy two related requirements. First, the period during which claims may be asserted "must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf." [*Mills v. Habluetzel*], 456 U.S. [91] at 99, 102 S.Ct. [1549] at 1555, 71 L.Ed.2d [770] at 778 (1982). Second, the time limitation imposed "must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims." *Id.* Examining this Commonwealth's six year statute of limitations in light of these requirements, we find no denial of equal protection.

502 Pa. at 416, 466 A.2d at 1021. Although this statute results in imposing a greater impediment to the illegitimate child's claim for support, it is substantially related to a legitimate state interest in preventing the litigation of stale or fraudulent claims. *Astemborski v. Susmarski, supra; Pickett v. Brown,* 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983); *Mills v. Habluetzel,* 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982). Accordingly, appellant's challenge to the constitutionality of the statute fails.

Appellant next contends that the appellee is estopped from raising the statute of limitations defense in light of his past contributions to the support of the child, his failure to contest birth records, and his stipulation as to paternity. We disagree.

[3] The operative language of the statute, 42 Pa. C.S. § 6704(e), now 42 Pa. C.S. 6704(b), provides:

> Limitation of actions. — All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgment by the reputed father.

The facts of the instant matter establish that the action was neither commenced within six years of the birth of the child nor within two years of the cessation of the voluntary financial contribution by the reputed father. Both parties set forth the fact that no support was received since April, 1975.

[4,5] Further, the appellee denies paternity and, although the appellant offers a stipulation as written acknowledgment, the document was not signed or admitted into evidence, and will not be considered on appellate review. See *Commonwealth v. Young,* 456 Pa. 102, 317 A.2d 258 (1974). Additionally such information must be excluded as a privileged part of the negotiations between counsel. *Smith v. Leflora,* 293 Pa. Super. 149, 437 A.2d 1250 (1980). Appellant's claim that the appellee has not contested the birth records is not raised or supported in the record, and therefore fails as well.

Accordingly we find that the instant action is clearly barred by the statute of limitations.

Order affirmed.

APPENDIX B

42 BUCKS CO. L. REP. 248

PAULUSSEN

vs.

HERION

C. P. BUCKS COUNTY, CIVIL ACTION — LAW, NO. 80-0262, SUPPORT:

BARBARA PAULUSSEN

v.

GEORGE RONALD HERION.

MIMS, J. July 27, 1983

Barbara Paulussen filed a petition for support on behalf of her minor child Georgeanne Veronica Paulussen, born March 5, 1972. The petition, filed on March 5, 1980, sets forth that from April 1975 to the present, the defendant has failed to support the minor child. The answer and new matter filed by defendant deny paternity and admit the fact that financial support ceased in April 1975.

Upon consideration of briefs filed by both parties, this Court entered an Order on June 8, 1983 granting the motion for summary judgment filed by defendant, George Ronald Herion; and denying the motion for summary judgment filed by plaintiff, Barbara Paulussen. On July 5, 1983, the petition for reconsideration and vacation of Order of June 8, 1983 was denied and dismissed. From these Orders, plaintiff now appeals.

The Judicial Code, 42 Pa. C.S.A. § 6704(e) provides:

> Limitations of actions. — All actions to establish the paternity of a child born out of wedlock brought under this

> section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgment by the reputed father. (Emphasis supplied.)

The facts reveal that the action was not commenced within six years of the birth of the child or within two years of voluntary financial contribution by the reputed father. The defendant has not acknowledged paternity in this matter.[1] This action is clearly barred by the statute of limitations as set forth in 42 Pa. C.S.A. § 6704(e).

At the time the Order granting defendant's motion for summary judgment was granted, the case of *Astemborski v. Susmarski,* ____Pa.____, 451 A.2d 1012 (1982), which upheld the constitutionality of the six year statute of limitations provision of 42 Pa. C.S.A. § 6704(e), was on appeal to the U.S. Supreme Court,[2] and there had been no appellate court decisions invalidating the two year period of limitation at issue here.[3] The *Astemborski* case addressed the six year period of

---

[1]Unexecuted stipulations on the issue of paternity were presented to but not approved by the court.

[2]Cert. granted, vacated and remanded to the Supreme Court of Pennsylvania, Western District, for further consideration in light of *Pickett v. Brown,* 462 U.S.____ (June 7, 1983). *Astemborski v. Susmarski.*____U.S.____, 51 U.S.L.W. 3901 (June 21, 1983).

[3]In *Hummel v. Smith,* 301 Pa. Superior Ct. 276. 447 A.2d 965 (1982), which involved a paternity action brought more than six years after the birth of the child for whom support was sought, but within two years of contribution to support or accknowledgment of paternity, Justices Beck and Popovich concurred, citing *Mills v. Habluetzel.* ____U.S.____, 102 S.Ct. 1549, 71 L.Ed.2d 770, (1982), on the ground that the statute of limitations unconstitutionally abridged an illegitimate child's right to assert parenthood or receive support. Justices Brosky and Popovich filed similar concurrences in *Williams v. Wolfe,* 297 Pa. Superior Ct. 270, 443 A.2d 831 (1982).

limitation, since it was undisputed that the alleged father had not acknowledged paternity and had not contributed to support of the child. However, it is noted in footnote 4 of the opinion that the two year period of limitation in the Statute did not unreasonably hinder the opportunity to prove paternity and obtain child support:

> Moreover, the statute at issue sets forth exceptions to the six year period of limitation which are designed to deal with the situation where a child born out of wedlock has had a continuing relationship with the natural father during the first six years of the child's life but the father has abandoned the child at a later point in the child's minority. ... Whereas the Texas one year statute of limitations [*Mills v. Habluetzel,* 456 U.S. 91 , 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982)] unreasonably hindered the opportunity to prove paternity and thus obtain child support, the Pennsylvania statute adequately affords a fair opportunity to do so. *Astemborski, supra* at 1015,n.4.

In light of the status of *Astemborski* at the time our Order was entered, we found that the statute of limitation as set forth in 42 Pa. C.S.A. § 6704(e) does not violate the equal protection guarantees of the Fourteenth Amendment to the U.S. Constitution and of Art. 1, § 26 of the Pennsylvania Constitution.

It was based on the foregoing reasons that we entered the Orders of June 8, 1983 and July 5, 1983.

By the Court,
/s/Harriet M. Mims, J.

[Appealed to the Superior Court.]

APPENDIX C

Supreme Court of Pennsylvania

Eastern District

MARLENE F. LACHMAN,
ESQ.
PROTHONOTARY
PATRICK TASSOS
DEPUTY PROTHONOTARY

468 CITY HALL
PHILADELPHIA, PA 19107
(215) 496-4600

April 24, 1985

Rosalie G. Davies, Esquire
108 Dudley Avenue
Narberth, PA 19072

RE: Barbara Paulussen, Petitioner v.
George Ronald Herion
NO. 824 E.D. ALLOCATUR DOCKET 1984

Dear Ms. Davies:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"April 21, 1985.

Petition Denied.

Per Curiam."

Very truly yours,

/s/ Patrick Tassos
Deputy Prothonotary

/mz
cc: Neil Stein, Esquire

APPENDIX D

IN THE

SUPERIOR COURT OF PENNSYLVANIA

EASTERN DISTRICT

BARBARA PAULUSSEN,
Appellant : NO. 01789
:
vs. :
:
GEORGE RONALD HERION,
Appellee :PHILADELPHIA 1983

NOTICE OF APPEAL
TO THE
SUPREME COURT OF THE UNITED STATES

(Filed: 6/20/85)

Notice is hereby given, that Appellant, Barbara Paulussen, hereby appeals to the Supreme Court of the United States from the final order of the Superior Court of the Commonwealth of Pennsylvania entered in this action on October 26, 1984, affirming judgment of the Court of Common Pleas of Bucks County, Pennsylvania, no. 80-0262. This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Rosalie G. Davies, Esq.

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225 Haverford Avenue
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Attorneys for Appellant

MOTION

Supreme Court, U.S.
FILED
SEP 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-88

In The

Supreme Court of the United States

October Term, 1984

—o—

BARBARA ANN PAULUSSEN,

Appellant,

vs.

GEORGE RONALD HERION,

Appellee.

—o—

On Appeal from the Superior Court of Pennsylvania

—o—

APPELLEE'S MOTION TO DISMISS OR AFFIRM

—o—

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STATEMENT OF QUESTIONS PRESENTED

1. THE SUPREME COURT OF THE UNITED STATES PREVIOUSLY DETERMINED THAT A STATE STATUTE WHICH LIMITS THE TIME WITHIN WHICH TO BRING AN ACTION ESTABLISHING PATERNITY AND WHICH IS OF SUFFICIENT AND SIGNIFICANT LENGTH AND WHICH BEARS A SUBSTANTIAL RELATIONSHIP TO THE STATE'S LEGITIMATE INTEREST IN THE PROTECTION OF ITS CITIZENS BY PREVENTING THE ASSERTION OF STALE OR FRAUDULENT CLAIMS DOES NOT OFFEND THE EQUAL PROTECTION GUARANTEES OF THE UNITED STATES CONSTITUTION, THEREBY FORECLOSING THE NEED FOR ADDITIONAL ARGUMENT.

2. WHERE APPELLANT RAISES AND INCLUDES IN HER JURISDICTIONAL STATEMENT REFERENCE TO MATTERS AND DOCUMENTS WHICH ARE DEHORS THE RECORD AND FOUND BY THE SUPERIOR COURT OF PENNSYLVANIA TO BE INADMISSIBLE AND PRIVILEGED MATTERS BETWEEN COUNSEL, THE INCLUSION OF WHICH IS PREJUDICIAL TO APPELLEE AND TAINTS THE APPEAL, THE UNITED STATES SUPREME COURT SHOULD DISMISS THE APPEAL, OR AT THE MINIMUM STRIKE ALL SUCH REFERENCES.

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STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On February 17, 1980, Appellant filed a Petition for Support of her illegitimate child born March 5, 1972. The Petition claimed that Appellee was the father of the child and that he last contributed to the child's support in April, 1975. The Petition was filed approximately *five* years after alleged support payments stopped and approximately *eight* years after the birth of the child. Appellee filed Preliminary Objections to the Petition on the basis that Appellant's claim was barred by the applicable statute of limitations contained in 42 Pa. Con. Stat. Ann. §6704(e), now repealed and supplanted by 42 Pa. C.S.A. §6704(b).

The Court of Common Pleas overruled the Preliminary Objections on a technical basis and gave leave to Appellee to file an Answer to the Petition and to raise the defense of the statute of limitations by way of New Matter as a bar to the support action. Appellee did file an Answer denying paternity and each of Appellant's allegations, stating only that there was no contribution to the support of Appellant's child at least from April, 1975 to the present. Appellee's Answer also contained New Matter raising the defense of the statute of limitations pursuant to the applicable Pennsylvania statute. Appellant replied to the New Matter, challenging the constitutionality of the Pennsylvania statute.

Subsequently, both parties filed Motions for Summary Judgment. The lower Court granted Appellee's Motion for Summary Judgment on the ground that Appellant's claim was barred by the statute of limitations. Appellant's Motion for Summary Judgment was denied. There

was never any trial on the merits and at all times pertinent thereto, Appellee denied paternity. A Petition for Reconsideration having been denied by the lower Court, Appellant filed an appeal to the Superior Court of Pennsylvania. By written opinion filed October 26, 1984, the Superior Court of Pennsylvania affirmed the Order of the lower Court. Appellant thereafter filed a Petition for allowance of appeal in the Supreme Court of Pennsylvania which was denied on April 21, 1985. This appeal followed.

II. ARGUMENT

A. The Supreme Court of the United States has previously determined that a state statute, which established a period of limitations of significant and sufficient length of time to provide a reasonable opportunity to institute a paternity action and which bears a substantial relationship to a legitimate state interest, is not violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Section 1 of the Fourteenth Amendment to the United States Constitution[1] requires that a state may not invidiously discriminate against similarly situated individuals. *Gomez v. Berez,* 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973); *Astemborski v. Susmarski,* 499 Pa. 99, 451 A.2d 1012 (1982), *vacated* — U.S. —, 103 S.Ct. 3105, 77 L.Ed.2d 1360, *reinstated, Astemborski v. Susmarski,* 502 Pa. 409, 466 A.2d 1018 (Pa. 1983). This constitutional guarantee does not prohibit a state from enacting statutes imposing some restrictions on similarly situated persons. For example, the United States Constitution does not require a state to "adopt procedures for illegitimate children that

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1 Section 1 of the Fourteenth Amendment to the United States Constitution is set forth verbatim in Appendix at a-1.

are coterminous with those accorded legitimate children." *Mills v. Habluetzel,* 456 U.S. 91, 97, 102 S.Ct. 549, 71 L.Ed. 2d 770 (1982). It is settled that a state statute may impose standards upon the claims of illegitimate children not imposed upon children born within a marriage and not offend equal protection guarantees where the statute "bear[s] an evident and substantial relation to the particular state interests th[e] statute is designed to serve." *Lalli v. Lalli,* 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978).

The Supreme Court of the United States has already applied the foregoing analysis to state statutes which restrict actions to determine paternity and has recognized the constitutionality of such statutes. In *Mills v. Habluetzel,* supra, this Court acknowledged that "in support suits by illegitimate children more than in support suits by legimate children, the state has an interest in preventing the prosecution of stale or fraudulent claims, and may impose greater restrictions on the former than it imposes on the latter." 456 U.S. at 98-99, 71 L.Ed.2d at 777.

In *Pickett v. Brown,* 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983) this Court summarized the equal protection analysis required when a statute of limitations governing paternity suits is challenged. The *Pickett* Court explained that a Court must focus upon two closely related requirements:

> The period for obtaining paternal support has to be long enough to provide a reasonable opportunity for those with an interest in illegitimate children to bring suit on their behalf; and, any time limit on that opportunity has to be substantially related to the State's interest in preventing the litigation of stale or fraudulent claims.

Id. At 76 L.Ed.2d 380. (citing *Mills v. Habluetzel,* 456 U.S. 91, 99-100, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982)).

In *Astemborski v. Susmarski,* supra, the Supreme Court of Pennsylvania applied the analysis contained in *Pickett v. Brown,* supra, to the six year aspect of the Pennsylvania statute as contained in 42 Pa. C.S.A. §6704 (b). The *Astemborski* Court held that the Pennsylvania six year limitation of action did not violate the equal protection guarantees of the United States (or Pennsylvania) Constitution. The Pennsylvania Supreme Court found that this statute passed the two-prong test required by *Pickett v. Brown,* supra, and *Mills v. Habluetzel,* supra, set forth above. Unlike the Texas statutes invalidated by this Court in *Pickett v. Brown,* supra, and *Mills v. Habluetzel,* the Pennsylvania statute grants a *minimum* of six years within which to institute an action to establish paternity.[2] In *Mills* and *Pickett,* the United States Supreme Court admonished that a limitations period may not run during the time that a mother would be loathe to file a paternity action because she may suffer from birth-related trauma.[3] Clearly, the Pennsylvania statute does not suffer from this infirmity, as stated in *Astemborski v. Susmarski,* supra, 466 A.2d at 1021:

> [U]nlike *Mills,* and *Pickett,* wherein certain birth-related financial and emotional factors were cited as encumbering a mother's filing of a paternity suit within one or two years, respectively, of her child's birth, the present case involves a period of limitation of such greater duration as to negate birth-related encumbrances.

The question becomes whether the period of time in the Pennsylvania statute, constitutionally adequate, bears a substantial relationship to Pennsylvania's clear interest in preventing the litigation of stale or fraudulent claims. *Lalli v. Lalli,* supra. This Court has already determined that the interest protected by the statute is legitimate. In *Mills v. Habluetzel,* supra, this Court acknowledged that the states have a legitimate interest in preventing fraudulent and stale claims and stated at 456 U.S. at 98-99, 71 L.Ed.2d at 777:

> Paternal support suits on behalf of illegitimate children contain an element that such suits for legitimate children do not contain: proof of paternity. Such proof is often sketchy and strongly contested, frequently turning upon conflicting testimony from only two witnesses. Indeed, the problems of proving paternity have been recognized repeatedly by this Court. *Parham v. Hughes,* 441 U.S. 347, 357, 361, 60 L. Ed. 2d 269, 99 S.Ct. 1742 (1979); *Lalli v. Lalli,* 439 U.S. 259, 269, 58 L. Ed. 2d 503, 99 S.Ct. 518 (1978); *Trimble v. Gordon,* 420 U.S. 762, 772, 52 L. Ed. 2d 31, 97 S.Ct. 1459 (1977); *Gomez v. Perez,* 409 U.S., at 538, 35 L. Ed. 2d 56, 93 S.Ct. 982.

As the Supreme Court of the United States permitted, the Pennsylvania legislature acted to protect a recognized "legitimate interest" and applied the presently challenged

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2 In addition to the approved six year period, the Pennsylvania statute grants a further right: the right to file an action within two years of the date of voluntary support contributions or acknowledgment in writing. It must be stressed that the two year aspect serves to *lengthen* the six year period and not to shorten the period granted to institute paternity actions in Pennsylvania.

3 This Court has explained birth-related trauma as "financial difficulties caused by childbirth expenses or a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or other emotional strain and confusion that often attend the birth of an illegitimate child." *Pickett v. Brown, Mills v. Habluetzel,* 456 U.S. at 100.

statute because of legal necessity. As stated in *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 314 (1945): "Statutes of limitation find their justification in necessity . . . . They are practical and pragmatic devices to spare the Courts from litigation of stale claims and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared and even evidence has been lost." The purpose of the challenged statute is to insure that the action, if it is brought, will be timely filed. The alleged increase in the number of illegitimate children or the factors relating to blood testing does not diminish the need for the protection of its citizens supplied by the state statute. In *Astemborski v. Susmarski,* supra, the Pennsylvania Supreme Court referred to the statements of the Supreme Court of the United States and stated at 466 A.2d at 1021:

> Insofar as the requirement set forth in *Mills* that periods of limitation bear a substantial relation to the state's interest in avoiding litigation of stale or fraudulent claims, the Court in *Pickett* rejected, as it had in *Mills,* the argument that recent advances in blood and genetic testing have provided scientific means so highly probative in determining paternity that their existence entirely negates the state interest in preventing the assertion of stale or fraudulent claims. *Pickett,* — U.S. —, at --, 103 S.Ct. at 2209, 76 L. Ed. 2d at 385. *Mills,* — U.S. at —, 102 S. Ct. at 1554, N. 4, 71 L. Ed. 2d at 777, N. 4. The Court noted in *Pickett* that blood tests can currently achieve at least a ninety percent means probability of exclusion of one as being the parent, and, accordingly, suggested that advances in blood testing have rendered more attenuated the relationship between such statutes of limitation and the exclusion of stale or fraudulent claims. — U.S. at —, 103 S.Ct. at 2209, 76 L.Ed. 2d at 385-386. Notwithstanding that possible attenuation, however, a period of limitation remains necessary, for in cases where test results do not exclude a certain male from the class of possible fathers, that male must rely on conventional forms of evidence as proof of nonpaternity, vs. evidence of lack of access to the mother, as well as his own testimony and the testimony of others. With regard to these conventional forms of proof, the state has a clear interest in having claims litigated while evidence remains available and fresh.

The highest Appellate Court of Pennsylvania has abided by the stated decisions of the United States Supreme Court and the questions urged for reversal by Appellant have been clearly foreclosed by the decisions of this Court. Further consideration or argument is unnecessary.

B. The Supreme Court of the United States should refuse to consider an appeal which raises references to matters dehors the record and to matters and documents which are privileged and inadmissible, the inclusion of which taints the entire Appellate process.

In its written opinion affirming the decision and opinion of the Court of Common Pleas of Bucks County, Commonwealth of Pennsylvania (*Paulussen v. Herion,* No. 80-0262), the Superior Court of Pennsylvania stated at page 3:

> Further, the Appellee denies paternity and, although the Appellant offers a Stipulation as written acknowledgement, the document was not signed or admitted into evidence, and will not be considered on Appellate review. *See Commonwealth v. Young,* 456 Pa. 102, 317 A.2d 258 (1974). Additionally, such information must be excluded as a privileged part of the negotiations between counsel. *Smith v. LeFlore,* 293 Pa. Super. 149, 437 A.2d 1250 (1980). Appellant's claim that the Appellee has not contested the birth records is not raised or supported in the record, and therefore fails as well.

Notwithstanding such appellate admonition, Appellant continues in her attempt to prejudice Appellee by including in her Jurisdictional Statement, so as to improperly bring to the attention of this Honorable Court, matters which were not only dehors the record, unsupported by the record, but matters which were clearly confidential and privileged.

Beginning at page 4 of Appellant's Jurisdictional Statement, and continuing onto page 5 thereof, Appellant has referred to Stipulations which were not agreed to by counsel, which were not signed by either party, which were not signed by either counsel and which were not filed with the lower Court. (Even the lower Court reflects in its opinion of July 27, 1983 at footnote number 1 that Stipulations were not approved by the Court.) Moreover Appellant sets forth in her Jurisdictional Statement privileged information allegedly contained in unsigned, unfiled documents and information allegedly discussed during negotiations and communications between counsel for the parties.[4] Both the lower Court, as well as the Superior Court of Pennsylvania, acknowledged and found that at all times during the entire proceedings Appellee did not acknowledge paternity.[5] Both counsel acknowledged that the legal

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4 Appellant went so far as to even suggest in her Motion for Summary Judgment filed and denied by the lower Court, that a piece of paper labeled as a Stipulation which was not agreed upon, which was unexecuted and not part of the record constituted a "fresh" written acknowledgment of paternity tolling the statute of limitations for another two years, for a total of ten years.

5 The Honorable Harriet M. Mins stated at page 2 of her opinion of July 27, 1983 that "The defendant (sic Appellee) has not acknowledged paternity in this matter." (explanation supplied).

issue surrounding the applicability of the statute of limitations as contained in 42 Pa. C.S.A. §6704(b)[6] would have to be first judicially determined, particularly inasmuch as Appellee vigorously denied paternity; that an actual trial on the factual issue of paternity would be extremely time consuming and costly to both parties. In that light, counsel for both parties attempted to word a stipulation that could be agreed to by both parties whereby the legality and constitutionality of 42 Pa. C.S.A. §6704(b) as raised by Appellant could be first judicially resolved preserving Appellee's continuous position denying paternity. Counsel could not agree and the lower Court would not approve of any suggested wording. Thereafter, Appellee filed his Motion for Summary Judgment and Appellant filed her cross-Motion for Summary Judgment; the lower Court granting the former and denying the latter. Not only has Appellee denied paternity throughout the proceedings, he denied each and every factual allegation which could possibly infer admission of paternity, including, but not limited to the averments contained in Appellant's Affidavit filed in support of her Motion for Summary Judgment. On this record, Appellee denied any exclusive relationship with Appellant at the time of conception; he denied accompanying Appellant to an obstetrician; he denied any payment of bills or agreements relating to birth certificates; he denied congenital hip defects between any children and the administering of blood testing or the results thereof, which were neither admitted nor placed in the record before the lower Court.

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6 42 Pa. C.S.A. § 6704(b) is set forth verbatim in Appendix at a-1 and replaces 42 Pa. C.S.A. § 6704(e) which has been repealed.

Despite all of Appellant's attempts at camouflage, the facts and documents referred to in Appellant's Jurisdictional Statement are simply not part of the record. At a minimum, this Court should not consider them. *Commonwealth v. Allen,* 478 Pa. 342, 386 A.2d 964 (1978); *Philadelphia Saving Fund Society v. Bethlehem,* 143 Pa. Super. 449, 17 A.2d 750 (1940); *Gee v. Eberie,* 279 Pa. Super. 101, 420 A.2d 1050 (1980). In *Commonwealth v. Allen,* supra, Appellant's counsel presented a written memorandum to the trial Court discussing certain issues. Noting that the memo was never officially filed with the lower Court, the appellate Court stated that it was not part of the record and it and the issues contained therein could not be considered on appeal, 478 Pa. at 345-46, N. 6, 386 A.2d at 965 N. 6. In *Philadelphia Saving Fund Society v. Bethlehem,* counsel for the parties had actually agreed to a stipulation of facts. This agreed-upon document was submitted to the lower Court, but the Court found it inadequate for its stated purpose. The appellate Court noted that the parties then abandoned their attempt at disposition of the case by stipulation. The trial Court subsequently refused the offer in evidence of admissions made in the agreed-upon stipulation and stated at 143 Pa. Super. at 452, 17 A.2d at 753:

> An agreement to a case stated may be rescinded either by tacit or express consent: the abandonment of it is satisfactorily evidenced by the parties subsequently pleading to issue; and when thus abandoned, it is not evidence which may be given to the jury upon the trial of the case: *McLughan v. Bovard,* 4 Watts 308; Hart's appeal, 8 Pa. 32; *Gibson v. Rowland,* 35 Pa. Superior Ct. 158.

Moreover, the described references made by Appellant in his Jurisdictional Statement are privileged; Appellant had

and has attempted to allege as fact conditional statements made for the sole purpose of procedural negotiations between counsel. These statements at the very least should be stricken from Appellant's Jurisdictional Statement. *Commonwealth v. Young,* 456 Pa. 102, 317 A.2d 258 (1974); *Smith v. LeFlore,* 293 Pa. Super. 149, 437 A.2d 1250 (1981); *Hess v. Steiner,* 144 Pa. Super. 249, 19 A.2d 560 (1941). It is submitted that Appellant's references as herein complained taint these proceedings and an appeal should not be permitted on the basis of facts and documents not of record and which formed the basis of privileged negotiations between counsel.

CONCLUSION

For all the foregoing reasons, it is requested that this Court dismiss the appeal and affirm the decision of the Pennsylvania Superior Court.

Respectfully submitted,

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APPENDIX

1. 42 Pa. C.S.A. §6704(b) provides:

   "(b) *Limitation of Actions*—All actions or proceedings to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have acknowledged in writing his paternity, in which case an action or proceeding may be commenced at any time within two years of such contribution or acknowledgement by the reputed father."

2. Section 1 of the Fourteenth Amendment of the Constitution of the United States provides:

   "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

JOINT

APPENDIX

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
27
NOV 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-88

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BARBARA PAULUSSEN,

Appellant,

vs.

GEORGE RONALD HERION,

Appellee.

On Appeal from the
Superior Court of Pennsylvania

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED JULY 17, 1985
PROBABLE JURISDICTION NOTED OCTOBER 15, 1985

No. 85-88

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BARBARA ANN PAULUSSEN, *Appellant,*

v.

GEORGE RONALD HERION, *Appellee.*

On Appeal from the
Superior Court of Pennsylvania

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The following opinions, decisions, judgments and orders have been omitted in printing this Joint Appendix because they appear in the following pages in the Appendix to the printed Jurisdictional Statement.

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IN THE COURT OF COMMON PLEAS
of
BUCKS COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

BARBARA PAULUSSEN 4510 Belmont Avenue Bensalem, Pennsylvania 19020	: : NO.80-0262
vs.	:
GEORGE RONALD HERION 364 Fairhill Road Churchville, Pennsylvania	: IN SUPPORT :

PETITION
(Filed February 11, 1980)

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The Petition of Barbara Paulussen respectfully represents:

1. That the Petitioner, Barbara Paulussen first met the Respondent, Ronald Herion on or about October of 1968.
2. That from approximately April of 1970, the Petitioner began to date the Respondent, seeing him nearly every day.
3. That on or about July 16, 1971, the Petitioner discovered that she was pregnant by the Respondent Ronald Herion.
4. That the Petitioner continued to date the Respondent during her pregnancy at which time he told her that he had asked his wife for a divorce but that she refused him.
5. That the Respondent accompanied the Petitioner to her obstetrician, Dr. Richard Roque at 6711 Oxford Ave., Philadelphia, Pennsylvania.
6. That on March 5, 1972 the Petitioner gave birth to a baby girl named Georgeanne Veronica Paulussen.
7. That the Respondent acknowledged paternity of the said Georgeanne by placing his name upon the birth certificate and

entering his name with the registrar of births at St. Mary's Hospital.

8. That the Respondent continued to date the Petitioner and provided financial support for his daughter from March 5, 1972 until approximately April 1975.

9. That from April, 1975 to the present, the Respondent has failed to support his child regularly after that.

10. That the Respondent is self employed as a printer d/b/a AVANT GRAPHICS, 1828 Orthodox Street, Philadelphia, Pennsylvania, 19124, with an estimated annual income of $50,000.

11. That the Petitioner is seeking support for her minor child Georgeanne Veronica Paulussen in the amount of One Hundred Dollars ($100) per week.

WHEREFORE, pursuant to the Judicial Code, Act of July 9, 1976 (P.L. 586 No. 142) as amended by Act of April 28, 1978 (No. 53), S6701 et seq., 42 C.P.S.A. S6701 et seq., the Petitioner prays that an order be entered for the support of her minor child in the amount of $100.00 per week.

/s/ _____
Barbara Paulussen

by/s/ _____
Rosalie G. Davies, Esquire
Attorney for Petitioner
Attorney I.D. No. 30218
108 Dudley Avenue
Narberth, Pa. 19072
(215) 667-7508

(Jurat of Paulussen Omitted in Printing)

OBJECTIONS TO PETITION FOR SUPPORT

Filed April 7, 1980
[Caption Omitted in Printing]

AND NOW, comes the above-named Respondent, George Ronald Herion, your Objector herein, and makes the following objections in a preliminary manner to the Petition for Support:

1. Your Objector avers that Barbara Paulussen and he are not Husband and Wife and he has been accused of being the father of a minor child named Georgeanne Veronica Paulussen, allegedly born March 5, 1972.

2. Your Objector avers that pursuant to the Petition for Support, a preliminary conference was held on or about March 18, 1980 in the Office of Domestic Relations, Doylestown, Penna.

3. Your Objector avers that at said preliminary conference, he did orally deny paternity and again, reasserts such denial of paternity.

4. Your Objector avers that at said preliminary conference, he did claim and assert that notwithstanding his denial of paternity, that the Petitioner, individually and/or on behalf of the minor child, is barred from any relief by the Statute of Limitations, as reasserted:

4a. Support for the minor child was initiated under and pursuant to the Judicial Code, Act of July 9, 1976, (P.L. 586 No. 142) as amended by Act of April 28, 1978 (No. 53), S6701 et. seq.

4b. The said Act of July 9, 1976 as amended by the Act of April 28, 1978, provides in pertinent part that no action for support can be brought after the expiration of six years or that no action shall be commenced after two years of any payment of support or acknowledgement of paternity.

4c. The Petition, on its very face, states and admits that your Objector did not contribute any support from April, 1975 until the very present time.

4d. Your Objector avers that the petitioner does not claim in any way to acknowledge paternity from April, 1975 until the present, all despite the fact that your objector denies any contribution or acknowledgement.

5. Objector avers that the claim for support is barred by the Statute of Limitations.

WHEREFORE, your objector, George Ronald Herion, respectfully prays that the Your Honorable Court dismiss the Petition for Support.

KRIMSKY, LUTERMAN, STEIN & LEVY

/s/ _____
NEIL H. STEIN
Attorney for Respondent

ANSWER TO PRELIMINARY OBJECTIONS

Filed December 4, 1980
[Caption Omitted in Printing]

The Plaintiff, in answer to the Preliminary Objections filed by the defendant, or to so much as is material and necessary to answer says:

1. Admitted

2. Admitted

3. Admitted

4. (a) - (d) Admitted

5. Denied. On the contrary plaintiff contends that the Statute of Limitations 42 Pa. CSA. Section 6704 is invalid in that it violates:

a) The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in that it treats similarly situated individuals, that is legitimate and illegitimate children, differently, and

b) Article I Section 28 Equal Rights Amendment of the Pennsylvania Constitution in that:

I) dependent upon the sex of the parent a child's right to get support is treated differently and

(II) dependent upon the sex of the parent the statute treats custodial parents differently.

WHEREFORE, plaintiff moves the Court to dismiss the Preliminary Objections filed by George Ronald Herion.

/s/ _____
ROSALIE G. DAVIES, ESQUIRE
Attorney for Plaintiff

[Certificate of Service Omitted in Printing]
[Jurat Omitted in Printing]

(a) Chronoligical List of Revelant Docket Entries from the

COURT OF COMMON PLEAS
OF
BUCKS COUNTY, PENNSYLVANIA—CIVIL

Barbara Ann Paulussen — No. 80-0262-5-10
v. — in Support
George Ronald Herion

February 11, 1980	Paulussen's Petition filed
April 7, 1980	Herion's Objection to Petition for Support Filed
April 23, 1980	Paulussen's Answer to Preliminary Objections filed.
October 3, 1980	Paulussen's Petition for Extension under the 240 day rule filed.
March 27, 1981	Paulussen's Answer to Preliminary Objections & Order filed.
May 12, 1981	Herion's Answer to Petition with New Matter filed.
June 19, 1981	Paulussen's Answer to Defendant's New Matter filed.
May 25, 1982	Paulussen's Petition for blood tests filed.
September 10, 1982	Herion's Motion for jury trial demanded.
April 16, 1983	Paulussen's Motion for Summary Judgment filed.
May 19, 1983	Paulussen's Praecipe for moving party to submit Motion for Summary Judgment for judicial disposition filed.
May 31, 1983	Herion's Motion for Objections to affidavit in support of petitioner's Motion for Summary Judgment filed.
May 31, 1983	Herion's Answer filed. Answer Contra Motion for Summary Judgment filed.
May 31, 1983	Herion's Motion for Summary Judgment filed.
June 8, 1983	Order entered. Motion for Summary Judgment in favor of Defendant is granted.

	Motion for Summary Judgment of Plaintiff is denied & dismissed.
June 15, 1983	Praecipe for moving party Paulussen to submit petition for reconsideration & vacating of order for judicial disposition filed.
July 5, 1983	Order entered. (It is hereby ordered & decreed that the petition for reconsideration & vacating order be denied & dismissed, H.M. Mims, J.
July 6, 1983	Paulussen Petition for reconsideration & vacating of support order filed.
July 6, 1983	Herion's Answer filed. (Answer Contra Petition for reconsideration & vacating of order filed).
July 7, 1983	Paulussen's Praecipe to enter judgment against plaintiff in support order & dismiss order & paternity filed.
July 7, 1983	Paulussen's Notice of Appeal to Superior Court of Pennsylvania filed.
July 11, 1983	Order entered. Plaintiff to file record in this court & serve on the undersigned a statement of the matters complained of on the appeal.
July 28, 1983	Order entered. Order pursuant to PA. R.A.P. 1925 filed.
June 10, 1985	Superior Court remand came to hand. Judgment affirmed.
July 1, 1985	Notice of Appeal to Supreme Court filed.

(b) Chronological List of Revelant Docket Entries from the SUPERIOR COURT OF PENNSYLVANIA OFFICIAL DOCKET

BARBARA PAULUSSEN

vs.

GEORGE RONALD HERION

Counsel

ROSALIE DAVIES
225 Haverford Avenue
Narberth, PA 19072

NEIL H. STEIN
FRANCES M. VISCO
PSFS Building — Suite 1414
12 S. 12th Street
Philadelphia, PA 19107

STATUS INFORMATION

October 12, 1985	Brief & Reprod. recd. combined October 12, 1983. Paulussen's Brief due.
November 16, 1983	Herion's brief filed November 11, 1983. Herion's brief due November 17, 1983 took briefs back because of motion to quash.
January 13, 1984	Herion's brief filed January 13, 1984. Herion's brief due
November 23, 1984	Motion for Allowance of Appeal.
October 26, 1984	Decision, Opinion and Judgment Date

(c) Chronological List of Revelant Docket Entries from the SUPREME COURT OF PENNSYLVANIA

BARBARA PAULUSSEN,

v.

GEORGE RONALD HERION

No. 824
E. D. Allocatur
Docket 1984

Filings — Proceedings

November 23, 1984	Petition for Allowance of Appeal from Superior Court at No. 1789 Philadelphia, 1983, Filed.
November 27, 1984	PAA received with Postal Notice.
November 27, 1984	Reproduced Record, Filed.
December 7, 1984	Respondent's Brief in Opposition to PAA, Filed.
April 21, 1985	Order: Petition denied. Per curiam.
May 29, 1985	Notice Exit to Common Pleas and Superior Courts.

ORDER

[Caption Omitted in Printing]

AND NOW, to wit, this 25th day of March, 1980, the defendant's Preliminary Objections are overruled with leave to defendant to file an answer within 20 days from the date hereof.

BY THE COURT:

/s/ _____
HARRIET M. MIMS J.

ANSWER TO PETITION WITH NEW MATTER

Filed May 12, 1981

(Caption Omitted in Printing)

1. Denied. After reasonable investigation Respondent is without present sufficient information or knowledge to form a belief as to the truth or veracity of the allegation contained in Paragraph 1 of the Petition and strict proof thereof is demanded at time of trial, the same being therefore denied.

2. Denied as stated. On the contrary, Respondent avers that while he did have the acquaintance of Petitioner, he did not see Petitioner nearly everyday. Respondent further avers that he is without present sufficient information or knowledge to form a belief as to whether or not he first became acquainted with Petitioner in or about April of 1970, and strict proof thereof is demanded at time of trial, the same being therefore denied.

3. Denied. After reasonable investigation, Respondent is without present sufficient information or knowledge to form a belief as to when Petitioner discovered that she was pregnant, and strict proof thereof is demanded at time of trial, the same being therefore denied. Respondent further avers that she did not become pregnant by Respondent. Respondent avers that at all times pertinent thereto Petitioner saw and was with other men.

4. Denied. It is denied that Respondent told Petitioner that he had asked his wife for a divorce and that she refused him. Respondent further avers that Petitioner confuses friendship with romance and dating.

5. Denied. After reasonable investigation Respondent is without present sufficient information or knowledge to form a belief as to truth or veracity of the allegations contained in paragraph 5 of the Petition, and strict proof thereof is demanded at time of trial if relevant, the same being therefore denied.

6. It is admitted that Petitioner gave birth to a baby girl although Respondent is without present sufficient information or knowledge to form a belief as to the date of birth of the baby girl and strict proof thereof is demanded at time of trial, if relevant, the same being therefore denied.

7. Denied. It is denied that Respondent acknowledged paternity of the baby girl by placing his name upon the birth certificate

and entering his name with the registrar of births at St. Mary's Hospital. Respondent avers that he did (and does not) not intend to acknowledge paternity by allowing his name to be placed upon the birth certificate and/or birth registrar. Respondent avers that he does not acknowledge paternity of said baby girl.

8. Denied. Respondent avers that any "financial" benefits, Respondent gave, were not intended as "child" support, but only as gifts to the Petitioner.

9. Admitted.

10. Denied as stated. It is admitted that Respondent is self-employed as a printer, but it is denied that Respondent has an annual income of $50,000.00.

11. Denied. No answer is required of Respondent as the averments are conclusions of law. Respondent further avers that he is not obligated to pay any support payments.

NEW MATTER

12. The Petition for support stated and admitted on its face that "from April, 1975 to the present, the respondent has failed to support his child.

13. Although Respondent has denied paternity, assuming for purposes of arguendo and this response he has admitted paternity, Respondent avers that Petitioner's action is barred pursuant to 42 Pa. S.C.A. § 6704 (e).

14. Respondent avers that 42 Pa. S.C.A. § 6704 provides as follows:

> "All actions commenced under this section shall be brought within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, *in which case an action may be brought at any time within two years of any such contribution or acknowledgement by the reputed father.*" (Emphasis supplied.)

15. Respondent avers that Petitioner admits that there have been no "support contributions" by Respondent since April, 1975 and there was not action instituted by Plaintiff within two years of April, 1975.

WHEREFORE, Respondent, George Ronald Herion, respectfully prays that your Honorable Court dismiss the Petition For Support.

/s/ _____
NEIL H. STEIN,
Attorney for Respondent,
George Ronald Herion

(Herion Jurat Omitted in Printing)

ANSWER TO DEFENDANT'S NEW MATTER

Filed June 19, 1981
(Caption Omitted in Printing)

12. Admitted.

13. Denied. On the contrary, plaintiff contends that the Statute of Limitations 42 Pa. C.S.A. Section 6704 subsection (e) is an invalid bar in this particular case and in general because:

a) It violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in that it treats similarly situated individuals, that is, legitimate and illegitimate children, differently.

b) It violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in that the words "All actions...." under subsection (e), which includes actions brought not only by the mother of the child but by the following moving parties listed in subsection (b):

> "any person having custody of the minor without the appointment of a guardian *ad litem*....any public body or private agency having an interest in the care, maintenance or assistance of any person to whom a duty of support is owing,"

discriminate between legitimate and illegitimate children by denying an independent cause of action to the illegitimate child that exists for the legitimate child.

c) It violates the constitutional prohibition against special laws, P.S. Const. Art. 8, Section 32 in that it treats similarly situated individuals, that is, legitimate and illegitimate children differently.

d) It violates Art. 1, Section 28 Equal Rights Amendment of

1. dependent upon the sex of the parent the statute treats custodial parents differently.

2. dependent upon the sex of the parent a child's right to get support is treated differently.

e) If the putative father has openly acknowledged paternity and contributed to the support of his child over a prolonged period of time, he should be estopped to assert the statute as a defense to a subsequent paternity action

f) The failure of a father of an illegitimate child to contest, or otherwise question, his name on the birth certificate of the child constitutes a recurring daily, overt act which acts to toll the statute under equitable doctrine.

14. Admitted.

WHEREFORE, Petitioner, Barbara Paulussen, respectfully prays your Honorable Court to hear the Petition for Support.

/s/ _____
Rosalie G. Davies,
Attorney for Petitioner,
Barbara Paulussen

(Paulussen's Jurat Omitted in Printing)

MOTION FOR SUMMARY JUDGMENT

Filed April 16, 1983
(Caption Omitted in Printing)

AND NOW, THIS 7th day of April, 1983, Petitioner, Barbara Paulussen, moves the Court as follows:

1. That It Enter, pursuant to Pa. R.C.P. Number 1035, a Summary Judgment in favor of Petitioner, for the relief demanded by Petitioner's Petition for Child Support, there being no genuine issue as to any material fact, the Petitioner being entitled to Judgment as a matter of law for the following reasons:

a) The Respondent acknowledges paternity, and to this end, both counsel presented Stipulations to the Court at a conference on February 24, 1983. The Court refused to accept either Stipulation, by letter of February 28, 1983, and suggested the filing of a Motion for Summary Judgment in lieu of same.

b) The Petitioner acknowledges that her complaint was filed beyond the statutory deadline for support actions under 42 Pa. C.S.A. § 6704, but alleges that the statute of limitations in question is unconstitutional as it applies to an acknowledging father, and that the acknowledging father is estopped to deny paternity indefinitely. To this end, the Petitioner has filed a Memorandum of Law on December 11, 1980, and Respondent filed an answering Memorandum on February 24, 1981. Petitioner filed a Supplemental Memorandum of Law as of this date (attached).

/s/ _____
Rosalie G. Davies, Esquire
Attorney for Petitioner

ROSALIE G. DAVIES, Esquire
IDENTIFICATION NO. 30218
108 Dudley Avenue
Narberth, PA 19072
(215) 667-7508

ATTORNEY FOR Petitioner

COURT OF COMMON PLEAS
OF
BUCKS COUNTY, PENNSYLVANIA

BARBARA PAULUSSEN	:	NO. 80-0262
vs.	:	
GEORGE RONALD HERION	:	In Support and Paternity

AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Commonwealth of Pennsylvania. :
SS
County of :

BARBARA PAULUSSEN, being duly sworn according to law, deposes and says:

1. I am the Petitioner in the support petition which is currently before the Court, in which I alleged that GEORGE RONALD HERION is the natural father of GEORGEANNE VERONICA PAULUSSEN, born March 5, 1972. I have personal knowledge of the matters hereinafter referred to and make this affidavit in support of Petitioner's Motion for Summary Judgment.

2. That I first met George Ronald Herion on or about October, 1968.

3. That from approximately April of 1970 I began to date Mr. Herion, seeing him nearly every day.

4. That on July 6, 1971, I learned that I was pregnant by Mr. Herion.

5. That from April, 1970 to July 16, 1971, I did not date any other man beside Mr. Herion.

6. That throughout my pregnancy I continued to date Mr. Herion exclusively.

7. That during the period of my pregnancy Mr. Herion told me that he had asked his wife for a divorce, but that she had refused him.

8. That Mr. Herion accompanied me to my obstetrician, Dr. Richard Roque.

9. That on March 5, 1972, I gave birth of a baby girl, Georgeanne Veronica Paulussen, at Saint Mary's Hospital in Philadelphia, and Mr. Herion paid the hospital bill.

10. That I named my daughter Georgeanne after George and Veronica after Ronald, because George Ronald Herion was the father of my child and I loved him and wanted to marry him.

11. That Mr. Herion acknowledged paternity by placing his name upon the birth certificate and entering his name with the Registrar of Births at Saint Mary's Hospital. That Mr. Herion acknowledged paternity by attending my daughter's christening at Christ the King Catholic Church, Philadelphia, Pennsylvania, and entered his name on the baptismal certificate. That the aforesaid birth certificate and baptismal certificate would be available as evidence at trial.

12. That I continued to date Mr. Herion from March 5, 1972 until April, 1975, and that during that period he provided financial support for his daughter Georgeanne, visited her on many occasions and sent her birthday cards.

13. That thereafter, Mr. Herion stopped dating me and stopped visitation and child support.

14. That I filed a petition seeking child support for Georgeanne Veronica Paulussen in February of 1980, four years and ten months after the last payment of child support.

15. That during the period from April, 1975, to February of 1980, I remained in love with Mr. Herion and dated no other men, hoping and believing that he would return to me.

16. That shortly after her birth, it was discovered that Georgeanne Paulussen had a congenital dislocated hip.

17. That Mr. Herion assured me that his daughter from his marriage, Rhonda Herion, had inherited the same congenital defect and had been treated successfully at Shriner's Hospital.

18. That Mr. Herion thereafter facilitated the admission of Georgeanne Paulussen to Shriner's Hospital, where she was treated by the same surgeon who had previously operated on

Rhonda Herion, Dr. Howard H. Steel, and Dr. Howard H. Steel would so testify at trial.

19. That during the trial preparation, the mother, father and child submitted to blood tests at Penn Jersey Regional Red Cross Blood Service at 23rd and Chestnut Streets, Philadelphia, Pennsylvania, and that the conclusion of these tests by Dr. William C. Sherwood was as follows:

> "Based upon the results of red cell and white cell testing, George Herion is not excluded as the father of Georgeanne Paulussen. Using the above data and the known gene frequencies for the systems tested, the probability that George Herion is the father of Georgeanne Paulussen as compared to a random man of the same race is 99.80%. The alleged father is 490 times more likely to be the true father of the child than is a random man of the same race."

That either Dr. Sherwood would have so testified at trial or the Court would have ordered tests on its own motion which would have resulted in an identical conclusion.

20. That my daughter from my marriage, Kathleen Paulussen, aged eighteen, would have testified that she recalled the birth of her half-sister and recalled Mr. Herion coming to visit Georgeanne when she was a baby, she recalled seeing him feed Georgeanne from a bottle and bringing gifts for the baby. She also recalled seeing him pick up the baby and say, "Daddy's little girl."

21. That my daughter, Georgeanne Paulussen, is now eleven years old and has settled features. That she looks very similar in features to George Ronald Herion and she would have been available to the trier of fact at trial.

22. That my daughter from my marriage, Barbara Paulussen, aged twenty, would have testified at trial that she recalled the birth of her half-sister and recalled Mr. Herion coming to visit Georgeanne. She recalled him bringing the following gifts for the baby, a high chair, a crib, toys and baby swing. She recalled him attending the baby's christening.

23. That Ms. Nancy Fogarty, our friend of more than ten years, would have been available to testify regarding her personal observations of my relationship with Mr. Herion, including the frequency of his phone calls to me at work when we were dating, and my naming him as the father of my child as soon as I learned that I was pregnant.

24. That Ms. Phyllis Selm, my friend of twenty five years, would have testified that Mr. Herion was at Georgeanne's christening; that both Mr. Herion and I asked her to be the godmother of our child; that Mr. Herion acknowledged paternity in her presence; that she observed Mr. Herion accompany me home from the hospital with the baby after she was born.

25. That Mr. Herion gave me a gold pinky ring that had belonged to his father as a token of his love and regard for me, and such would have been offered into evidence.

26. That I have kept my diaries for the years 1971, 1972, 1973, 1974, 1975 and 1976, and that most of the factual averments of this affidavit are thereby documented.

27. That in particular, I would have offered into evidence a series of entries during 1972 when Mr. Herion was admitted to hospital suffering from depression, three months after Georgeanne was born, as follows:

Thursday, September 21, 1972

"Bob told me Ron was rushed to the hospital from work. Had an argument with him at work early in the morning"

Friday, September 22, 1972

"Ron called 7:30 a.m. from hospital. He said he was going to see attorney when discharged."

Saturday, September 23, 1972

"Ron called, seemed to have a lot of faith in Dr. Kwik so I called her. Told me to come and see Ron."

Sunday, September 24, 1972

"Saw Ron in hospital at 7 a.m."

Monday, September 25, 1972

"Saw him 12:00 p.m. until 1:45. If he really means it about, getting married, I'd be the happiest girl in the world."

Tuesday, September 26, 1972

"Went to see Ron after visiting hours. He discussed getting married."

Wednesday, September 27, 1972

"Saw Ron again after hours. He talked again about marriage and how much he should give Ginny (his wife) for support. He wants to move after about a year."

Thursday, September 28, 1972

"Saw Ron after hours. Again discussed getting married and attorney. Dr. told Ginny he was going to tell her something she didn't like. I couldn't believe it."

Friday, September 29, 1972

"Ron was discharged. He told Ginny and his mom about me and baby and he was leaving. We had to get my mom because she lost her sight. I'm so happy about us I could bust. We told Mom."

Saturday, September 30, 1972

"Ron came to tell me he changed his mind again about the divorce."

28. That the following photographs, out of hundreds, would have been offered into evidence:

a) Ron holding Georgeanne - age 18 months

b) Ron and Barbara holding Georgeanne on Ron's birthday, January 16, 1975

c) Ron with Georgeanne on Georgeanne's birthday, March 5, 1975

d) Ron playing with Georgeanne on Georgeanne's birthday, March, 1975

e) Ron holding Georgeanne - Christmas, 1973

f) Ron holding Georgeanne - Christmas, 1972

g) Ron with Georgeanne - Christmas, 1972

h) Ron feeding Georgeanne with a bottle, March 9, 1972 (4 days old)

i) Ron holding Georgeanne in his arms and kissing her, March 9, 1972

j) Ron and Barbara holding Georgeanne, March 10, 1972 (5 days old)

k) Ron and Barbara holding Georgeanne, March 10, 1972 (5 days old)

l) Ron and Barbara holding Georgeanne on a trip to Hershey, Pennsylvania - August, 1972

m) Ron holding Georgeanne in his arms in Hershey, PA - August, 1972

n) Ron holding Georgeanne, March 5, 1973, her first birthday

o) Ron playing with Georgeanne, March 5, 1975, her third birthday

p) Ron playing with Georgeanne, March 5, 1975, her third birthday

q) Ron and Barbara holding Georgeanne, March 5, 1975, her third birthday

29. That the following cards, out of over one hundred, would have been entered into evidence:

a) Printed Birthcard, "Glad it's a Girl" signed, "Love is everything Ron"

b) Printed Mother's Day Card, undated, "You've made me very happy, I'm so glad you came into my life. Happy Mother's Day with Love" signed, "Ron"

c) Printed Mother's Day Card, undated, "Beautiful Moments...those shared with you, Happy Mother's Day with love" signed, "forever Ron"

d) Printed Mother's Day Card - 1974, "Love on Mother's Day...n' Every Day" signed, "love ya! Ron"

e) Printed Valentine Card - 1973, "Happy Valentine's Day and All My Love. Whenever we're together, I'm happy as can be - And words can never tell you, Just how much you mean to me - So with this Valentine I send, The Love that's in my heart, And it is yours forever - As it was right from the start" signed, "Love forever Ron"

f) Printed HOT STUFF Valentine Card, undated, "Honey, Valentine's Day is a time for fun and games, Happy Valentine's Day" signed, "Love Ron"

g) Printed Anniversary Card, undated, "Always now...Always new...Happy Anniversary" signed, "All my love, Ron"

h) Printed card, undated, "The most beautiful moments of my life...are the moments I spend with you" signed, "Love, Ron"

i) Printed MINIMITES Card, undated, "I must confess, It's time to be honest, I must face reality, It is time, I do love the way you smile, and you always smell good, and you always dress nice, and you're great to be with, But even though you're all those things, and much, much more, Now I must confess my real reason for liking you so much, You're downright sexy!" signed, "Love Ron"

j) Printed Christmas Card, undated, "For my Sweetheart at Christmas, Merry Christmas, Happy New Year, Christmas time reminds me of the pleasant hours we've known, the special little jokes we've shared, The thoughtfulness you've shown. And Christmas makes me stop to think, How glad I'll always be, You came along and made the world, A happier place for me" signed, "Love you, Ronnie"

k) Printed Card, 1972, "When two dream as one, even the ancient stars seem new, after Kahlil Gibran," "All the world is new when we're togethering" signed, "I love you, Ron"

l) Printed Card with Playboy and Playmate Buttons Attached, undated, "His and hers Buttons" signed, "I love you, Ron"

m) Printed Card, undated, "I was gonna sing Happy Birthday to you...but unfortunately my signing is confined to the SHOWER — However, if you don't mind getting a little wet..." signed, "love you, Ron"

n) Printed Card, undated, "Happy Birthday — Superbody" signed, "Love Ron"

o) Printed Card, undated, "We must have been made for each other — because we fit together so well!!" signed, "love ya! Ron"

p) Printed Card, undated, "I love you and I don't care who knows it — This Card will SELF-DESTRUCT In 5 Seconds" signed, "Ron"

q) Printed Mother's Day Card, 1974, "May love always touch your life as lovingly as you have touched mine. Happy Mother's Day with Love" signed, "Forever, Ron"

I hereby declare the foregoing to be true and correct to the best of my personal knowledge, information and belief.

/s/ _____
Barbara Paulussen

(Notary Omitted in Printing)

COHEN, SHAPIRO, POLISHER, SHIEKMAN and COHEN
BY: SHLB STEIN
IDENTIFICATION NO. 13648
TWENTY-SECOND FLOOR — PHILADELPHIA SAVING FUND BUILDING
PHILADELPHIA, PA. 1910
(215) WA 2-1300
ATTORNEY FOR Respondent

BARBARA PAULUSSEN

VS.

GEORGE RONALD HERION

BUCKS COUNTY
COURT OF COMMON PLEAS DIVISION

TERM.

In Support and Paternity
No. 80-0262

STIPULATION

It is hereby stipulated and agreed by and between Barbara Paulussen, the above-captioned Petitioner, and George Ronald Herion, the above-captioned Respondent, as follows:

1. For the purposes of these proceedings, Respondent will admit that he is the father of the minor child identified as Georgeanne Paulussen.

2. It is understood that the said admission of paternity is totally without prejudice to Respondent's claims of statutory defenses barring any liability for child support and equally without prejudice with respect to Petitioner's claim that a denial of child support would violate certain constitutional rights and privileges.

3. It is understood that the Court, in determination of the legal claims submitted, will not in any way refer to Respondent's admission of paternity and will not in any way base its determination of any of the claims of constitutional violation or statute of limitation or any part thereof on the fact that there has been admission of paternity.

4. It is acknowledged that prior Memorandums of Law submitted to the Court on behalf of both parties must be updated. Petitioner shall have until December, 1982 to submit her supplemental memorandum and Respondent shall have until , 198 , to submit his supplemental memorandum.

5. It is understood that in the event the Court sustains Petitioner's claims, there shall be a determination of the amount of Respondent's support obligation, after full evidentiary hearing.

6. It is the present intention and expectation of both parties that one or the other party, or both parties, will appeal the Court's determination as to legal claims, or as to support through the State and/or Federal appellate levels and the Court, upon request, will certify all issues as appealable matters.

7. Nothing contained herein is intended to prevent either party from seeking or obtaining a supercedeas from this Court or from any appellate Court.

8. This Stipulation shall not be in effect or binding upon the parties until there has been Court approval of same.

_____ as to /s/_____
BARBARA PAULUSSEN

_____ as to /s/_____
GEORGE RONALD HERION

COURT OF COMMON PLEAS

BUCKS COUNTY
SEVENTH JUDICIAL DISTRICT
DOYLESTOWN, PENNSYLVANIA
18901
(215) 348-2911

ISAAC S. GARB
PRESIDENT JUDGE
JUDGES
PAUL R. BECKERT
EDMUND V. LUDWIG
WILLIAM HART RUTE, III
HARRIET M. MIMS
GEORGE T. KELTON
OSCAR S. BORTNER
KENNETH G. BRAUN
EDWARD G. WEBSTER, JR.
LEONARD B. SOKOLOVE

SENIOR JUDGES
EDWIN H. SATTERTHWAITE
LAWRENCE A. MONROE
JOHN JUSTUS BODLEY

February 28, 1983

Rosalie G. Davies, Esquire
108 Dudley Avenue
Narberth, Pa. 19072

Neil H. Stein, Esquire
18th Floor
1616 Walnut Street
Philadelphia, Pa. 19103

Re: Paulussen v. Herion
No. 80-262-10-S

Dear Ms. Davies and Mr. Stein:

I have reviewed the stipulations which you left at the conference on February 24th as well as the pleadings which have been filed in this case.

The petition for support sets forth that from April, 1975, to the present, the defendant has failed to support the minor child, Georgeanne Veronica Paulussen. The answer and new matter filed by defendant deny paternity and admit the fact that financial support ceased in April, 1975. The petition for support was not filed until March 5, 1980.

The Judicial Code, 42 Pa. C.S.A. § 6704 (e) provides:

> (e) Limitation of actions. — All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgement by the reputed father.

The Support Rules, Pa. R.C.P. 1910.7(b) provide that if a defendant in a paternity case raises the defense of the statute of limitations, the court shall promptly dispose of the question and may, in an appropriate case, stay the domestic relations office conference.

Preliminary objections filed by the defendant raising the defense of the statute of limitations were denied and dismissed as a result of a finding that the Statute of Limitations violated equal protection guarantees. Our Supreme Court has recently found, however, that the Statute of Limitations is constitutional. See *Astemborski v. Susmarski,* 451 A.2d 1012 (1982). Moreover, our Superior Court has held, in effect, that the statute is to be applied retroactively. *Williams v. Wolfe,* 297 Pa. Superior Ct. 270, 443 A.2d 831 (1982).

It seems very clear that stipulations on the issue of paternity should not be presented at this time. I cannot approve an agreement in which the parties are bargaining away their rights to support and duties and responsibilities to support their child.

Since the pleadings are closed and since you do not desire a hearing but are anxious to have the matter decided by an appellate court, you might consider the possibility of one of you filing a motion for a Summary Judgment.

Very truly yours,

_____

/s/Harriet M. Mims J.

HMM:rjt

MOTION FOR SUMMARY JUDGMENT

Filed May 3, 1983

(Caption Omitted in Printing)

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

AND NOW, comes the above-named Respondent, George Ronald Herion, as Petitioner herein, by and through his Counsel, Neil H. Stein, Esquire, and moves the Court for Summary Judgment in his favor and against Respondent, Barbara Paulussen, as follows:

1. Respondent, Barbara Paulussen, caused to be filed in or about February, 1980, a Complaint for Support seeking support for an alleged minor child born to her.

2. accused and alleged that Petitioner, George Ronald Herion, was the father of the aforesaid child.

3. The Complaint in Support states in Paragraph 9 thereof as follows:

> "9. That from April, 1975 to the present the Respondent has failed to support his child."

4. Petitioner herein caused to be filed an Answer to the Complaint containing new matter, a true and correct copy of which is attached hereto as Exhibit "A" and incorporated herein by reference thereto as if here set forth in extenso.

5. Paragraph 14 of the Answer states as follows:

> "Respondent avers that 42 Pa. S.C.A. §6704 provides as follows:
>
> All actions commenced under this section shall be brought within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, *in which case an action may be brought at any time within two years of any such contribution or acknowledgement by the reputed father.*' (Emphasis supplied)"

6. Respondent has recently caused to be filed a Motion for Summary Judgment in which she states in paragraph 1 (b) as follows:

> "The Petitioner (sic) Barbara Paulussen acknowledges that her Complaint was filed beyond the statutory deadline for support actions under 42 Pa.C.S.A. §6704, ..."

7. The Respondent, Barbara Paulussen, on the very face of the pleadings before this Court, has admitted that her action is barred by the applicable statute of limitations, which provides as follows:

8. Petitioner avers that he has not and does not acknowledge Paternity in this matter.

9. Petitioner avers that since there has been no acknowledgement of paternity, the issue of paternity is not material in view of the fact that this matter is barred by the applicable statute of limitations as aforesaid.

WHEREFORE, Petitioner, George Ronald Herion, respectfully prays that your Honorable Court enter judgment in favor of George Ronald Herion and against Respondent Barbara Paulussen.

/s/ _____
NEIL H. STEIN, ESQUIRE
Attorney for Defendant,
George Ronald Herion

(Herion's Jurat Omitted in Printing)

EXHIBIT "A"

ANSWER TO PETITION WITH NEW MATTER

Filed May 12, 1981

(Caption Omitted in Printing)

1. Denied. After reasonable investigation Respondent is without present sufficient information or knowledge to form a belief as to the truth or veracity of the allegation contained in Paragraph 1 of the Petition and strict proof thereof is demanded at time of trial, the same being therefore denied.

2. Denied as stated. On the contrary, Respondent avers that while he did have the acquaintance of Petitioner, he did not see Petitioner nearly everyday. Respondent further avers that he is without present sufficient information or knowledge to form a belief as to whether or not he first became acquainted with Petitioner in or about April of 1970, and strict proof thereof is demanded at time of trial, the same being therefore denied.

3. Denied. After reasonable investigation, Respondent is without present sufficient information or knowledge to form a belief as to when Petitioner discovered that she was pregnant, and strict proof thereof is demanded at time of trial, the same being therefore denied. Respondent further avers that she did not become pregnant by Respondent. Respondent avers that at all times pertinent thereto Petitioner saw and was with other men.

4. Denied. It is denied that Respondent told Petitioner that he had asked his wife for a divorce and that she refused him. Respondent further avers that Petitioner confuses friendship with romance and dating.

5. Denied. After reasonable investigation Respondent is without present sufficient information or knowledge to form a belief as to truth or veracity of the allegations contained in paragraph 5 of the Petition, and strict proof thereof is demanded at time of trial if relevant, the same being therefore denied.

6. It is admitted that Petitioner gave birth to a baby girl although Respondent is without present sufficient information or knowledge to form a belief as to the date of birth of the baby girl and strict proof thereof is demanded at time of trial, if relevant, the same being therefore denied.

7. Denied. It is denied that Respondent acknowledged paternity of the baby girl by placing his name upon the birth certificate and entering his name with the registrar of births at St. Mary's Hospital. Respondent avers that he did (and does not) not intend to acknowledge paternity by allowing his name to be placed upon the birth certificate and/or birth registrar. Respondent avers that he dies not acknowledge paternity of said baby girl.

8. Denied. Respondent avers that any "financial" benefits, Respondent gave, were not intended as "child" support, but only as gifts to the Petitioner.

9. Admitted.

10. Denied as stated. It is admitted that Respondent is self-employed as a printer, but it is denied that Respondent has an annual income of $50,000.00

11. Denied. No answer is required of Respondent as the averments are conclusions of law. Respondent further avers that he is not obligated to pay any support payments.

NEW MATTER

12. The Petition for support stated and admitted on its face that "from April, 1975 to the present, the respondent has failed to support his child.

(Herion's Jurat Omitted in Printing)

ANSWER CONTRA MOTION FOR SUMMARY JUDGMENT

Filed May 3, 1983

(Caption Omitted in Printing)

TO THE HONORABLE, THE JUDGES OF SAID COURT:

AND NOW, comes the above-named Respondent, George Ronald Herion, by and through his Counsel, Neil H. Stein, Esquire, and makes the following Answer contra Motion for Summary Judgment:

1. Denied. The Court should not enter a Summary Judgment in favor of Petitioner as there are genuine issues of material facts and further, Petitioner is not entitled to Judgment as a Matter of law, nor is Petitioner entitled to Summary Judgment because she is precluded from proceeding on the underlining action as a matter of law.

Respondent further avers and responds to the reasons offered by Petitioner as follows:

a) Respondent does not admit and has never admitted paternity. Respondent avers that at no time were stipulations ever executed by Respondent, nor has there ever been any written acknowledgement by Respondent of paternity. Respondent avers that the only reason stipulations were presented by the respective parties through their counsel to the Court was for guidance purposes in order to avoid litigation over the issue of paternity as Respondent had raised and continues to raise a legitimate claim that Petitioner's action was *in fact* and *in law* barred by the applicable statute of limitations pursuant to 42 Pa. C.S.A. § 6704. Respondent avers that it was hopeful by and between the parties that a Stipulation could be reached whereby the parties would, without acknowledgement of paternity, be able to proceed solely on the question of the statute of limitations and its applicability to the present case.

b) Respondent acknowledges Petitioner's admission that the Complaint for Support was filed beyond the statutory deadline pursuant to 42 Pa. C.S.A. § 6704 and as such Petitioner's action is barred by the applicable statute of limitations.

Respondent further objects to the inclusion of the "Affidavit" submitted by Petitioner. Respondent denies the statements and the inferences raised therein and has not been properly subject to cross examination. Simultaneously with the filing of this Answer Contra Motion for Summary Judgment Respondent has caused to be filed objections to the "Affidavit" in support of Petitioner's Motion for Summary Judgment.

WHEREFORE, Respondent, George Ronald Herion, respectfully prays that your Honorable Court deny the Motion for Summary Judgment.

/s/ _____

NEIL H. STEIN, ESQUIRE
Attorney for Defendant,
GEORGE RONALD HERION

(Herion Jurat Omitted in Printing)

ORDER PURSUANT TO BUCKS COUNTY R.C.P. *266

Filed June 8, 1983
(Caption Omitted in Printing)

AND NOW, this 8th day of June, 1983, upon consideration of briefs filed by both parties, it is hereby Ordered and Decreed that the Motion for Summary Judgment in favor of George Ronald Herion is granted; and the Motion for Summary Judgment in favor of Barbara Paulussen is denied and dismissed.

BY THE COURT:

/s/ _____
HARRIET M. MIMS J.

ORDER

Filed July 5, 1983
(Caption Omitted in Printing)

AND NOW, this 5th day of July, 1983, upon consideration of the Petition for Reconsideration and Vacation of Order, and the issue of the applicability of the Statute of Limitations having been clearly presented to the court, it is hereby Ordered and Decreed that the Petition for Reconsideration and Vacation of Order of June 8, 1983, be denied and dismissed.

BY THE COURT:

/s/ _____
HARRIET M. MIMS J.

APPELLANT'S

BRIEF

Supreme Court, U.S.
FILED
NOV 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-88

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BARBARA PAULUSSEN,

Appellant,

vs.

GEORGE RONALD HERION,

Appellee.

On Appeal from the
Superior Court of Pennsylvania

APPELLANT'S BRIEF ON THE MERITS

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JURISDICTIONAL STATEMENT FILED JULY 17, 1985
PROBABLE JURISDICTION NOTED OCTOBER 15, 1985

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does a statute of limitation of six years from birth in an action for child support for illegitimate children violate the Equal Protection Clause of the Fourteenth Amendment, where there is no equivalent period of limitation for the support of legitimate children?

2. Does a two year statute of limitation extension for an action for child support against a father who acknowledges paternity violate the Equal Protection Clause of the Fourteenth Amendment when there is no equivalent period of limitation for the support of legitimate children?

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No. 85-88

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BARBARA PAULUSSEN — *Appellant*

v.

GEORGE RONALD HERION. — *Appellee*

On Appeal from the
Superior Court of Pennsylvania

APPELLANT'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion and order of the Superior Court of Pennsylvania (Jur. State. App. A, a-1 to a-4) is reported at 334 Pa. Super. 585, 483 A.2d 892 (1985). The Order of the Pennsylvania Supreme Court denying Appellant's Petition for Allowance of Appeal is not reported (Jur. State. App. C, a-8).

The opinion and order of the Bucks County Court of Common Pleas, the lower court (Jur. State. App. B, a-5 to a-7), is reported at 42 Bucks County Law Reporter 248 (1983).

JURISDICTION

The judgment of the Superior Court of Pennsylvania affirming the judgment of the lower court time-barring Appellant from instituting a support action on behalf of her minor illegitimate daughter, Georgeanne Veronica Paulussen, was entered on October 26, 1984 (Jur. State App. A, a-1 to a-4). This order was rendered by the highest court in the Commonwealth of Pennsylvania in which review of such an order could be had. 42 Pa. C.S.A. §742. On April 21, 1985, the Supreme Court of Pennsylvania denied Appellant's Petition for Allowance of Appeal (Jur. State App. C, a-8). On June 20, 1985, a Notice of Appeal (Jur. State App. D, a-9) was filed with the Superior Court of Pennsylvania.

This Appeal was docketed with this Court on July 17, 1985 within ninety (90) days from the date of the denial of Appellant's Petition for Allowance of Appeal below. Probable jurisdiction was noted on October 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> *"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*

42 Pa.C.S.A. §6704(e) (repealed) provides:

> *(e) Limitation of actions* — All actions to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action may be commenced at any time within two years of any such contribution or acknowledgment by the reputed father.

42 Pa.C.S.A. §6704(b)[1] provides:

> (b)*Limitation of actions* — All actions or proceedings to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity. In which case an action or proceeding may be commenced at any time within two years of such contribution or acknowledgment by the reputed father.

§4343 of Act No. 66 of 1985 - Amending Title 23 P.S. - enacted on October 31, 1985 - and effective within 90 days, provides:

> (b) *Limitation of actions* — An action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of birth of the child.

48 P.S. §131 provides:

> *Right of action; jurisdiction; spouses competent witnesses:* If any man shall separate himself from his wife or children without reasonable cause, and, being of sufficient ability, shall neglect or refuse to provide suitable maintenance for his said wife or children, action may be brought, at law or in equity, against such husband for maintenance of said wife or children.

42 Pa.C.S.A., Pa.R.C.P. 1910.7 provides:

> *No Pleading by Defendant Required. Question of Jurisdiction or Venue or Statute of Limitations in Paternity*
>
> (a) No pleading by the defendant shall be required, but if defendant elects to file a pleading, the domestic relations office conference required by the order of court shall not be delayed.

---

[1] 42 Pa. C.S.A. §6704(b) is almost a verbatim reenactment of 42 Pa. C.S.A. §6704(e). The only difference is the words "or proceedings" following the words "all actions" in the beginning of the statute.

(b) If defendant raises a question of jurisdiction or venue or in paternity cases the defense of the statute of limitations, the court shall promptly dispose of the question and may, in an appropriate case, stay the domestic relations office conference.

42 Pa.C.S.A., Pa.R.C.P. 1910.13 provides:

Paternity

(a) If the action seeks support for a child born out of wedlock and the reputed father is named as defendant, the defendant may acknowledge paternity in a verified writing substantially in the form provided by Rule 1910.28(a). In that event the action shall proceed as in other actions for support.

(b) If the reputed father does not execute an acknowledgment of paternity, the domestic relations officer shall terminate the conference. He shall advise the parties that there will be a trial without jury on the issue of paternity unless within ten days after the conference either party demands a trial by jury as provided by Rule 1910.28(b).

NOTE: See §6131 of the Judicial Code, 42 Pa.C.S.A. §6131 et seq. for the Uniform Act on Blood Tests to Determine Paternity

STATEMENT

On February 17, 1980, Appellant, Barbara Paulussen filed a Paternity and Child Support Petition in the Bucks County Court of Common Pleas on behalf of her minor illegitimate daughter, Georgeanne Veronica Paulussen who was born on March 5, 1972 (J.A. 1). In the petition, Barbara Paulussen alleged that George Ronald Herion was the father of Georgeanne Veronica. At the time of Georgeanne's conception and birth, George Herion was not married to Barbara. The Petition further alleged that from the date of Georgeanne's birth until April of 1975, George Herion provided financial support for his daughter. Then, support ceased. Barbara Paulussen alleged that George Herion had an estimated salary of $50,000 a year and requested $100 a week in child support for Georgeanne (J.A. 1).

On April 7, 1980, Appellee, George Ronald Herion filed Preliminary Objections to the Paternity and Support Petition.

These preliminary objections raised the time-bar of the Pennsylvania statute of limitation for paternity actions, 42 Pa.C.S.A. 6704(e) (J.A. 3).

Appellant responded to the Preliminary Objections by raising the issue of the constitutionality of the Pennsylvania statute of limitation for paternity actions in her Answer filed on April 23, 1980 (J.A. 5).

Thereafter, the Bucks County Court of Common Pleas entered an Order overruling George Ronald Herion's Preliminary Objections and granting him leave to file an Answer to the original Child Support Complaint (J.A. 9).

Herion duly filed an Answer denying the paternity of Georgeanne and admitting that his financial contributions to her support ended in April of 1975 (J.A. 10).

The defense of the Pennsylvania Statute of Limitation for paternity action was raised in the New Matter portion of his Answer (J.A. 10).

George Herion alleged that the support action was barred since Georgeanne was born more than 6 years prior to the institution of the suit, and because it had been more than two years since he last contributed to her support (J.A. 10).

Barbara Paulussen's Reply to New Matter again challenged the constitutionality of the Pennsylvania statute of limitation (J.A. 13). The case was listed for trial on October 28, 1982. On the eve of trial, Appellee's counsel contacted Appellant's counsel by telephone and offered to sign a stipulation acknowledging that George Herion was the father of Georgeanne Paulussen with the condition that this acknowledgement of paternity would not prejudice George Herion's rights to raise the statute of limitation defense on appeal. In return for this stipulation of acknowledgement, Barbara Paulussen would waive her right to proceed to trial on the paternity issue. On February 28, 1983, the lower court judge refused to allow the filing of stipulations in this matter (J.A. 15).

Thereafter, in accordance with the lower court's suggestion, the parties filed Motions for Summary Judgment. The sole basis for the reputed father's Motion for Summary Judgment was the untimely filing of the support action on behalf of Georgeanne (J.A. 27).

The mother filed her Motion for Summary Judgment on the

grounds that the Appellee's proposed stipulation of acknowledgement of paternity was a "fresh" written acknowledgement which tolled the Pennsylvania statute of limitation for another two years. In the alternative, the Motion for Summary Judgment challenged the Pennsylvania statute of limitation as a violation of Georgeanne's constitutional rights to equal protection of the laws (J.A. 15).

In the affidavit in support of her Motion for Summary Judgment, the mother averred that George Herion had been Barbara Paulussen's exclusive date at the time of Georgeanne's conception; that George Herion had accompanied Barbara Paulussen to an appointment with her obstetrician following her pregnancy; that George Herion had paid the hospital bill after Georgeanne was born; that George Herion had been named as Georgeanne's father on both her birth certificate and baptismal certificate; that Georgeanne and a daughter born in wedlock to Herion had identical congenital hip defects; and that blood test results would be introduced into evidence, at time of trial, would demonstrate a 99.80 per cent probability that George Herion was Georgeanne's father.

On June 8, 1983, the lower court denied the mother's Motion for Summary Judgment and granted the father's Motion (J.A. 32). Barbara Paulussen's Support Petition on behalf of her daughter was dismissed as a result. On July 5, 1983, Appellant's subsequent Petition for Reconsideration and Vacation of the Order was dismissed (J.A. 32). The matter was then appealed to the Superior Court of Pennsylvania.

Following the appeal, the lower court wrote an opinion (Jur. State App. B, a-5 to a-7) which stated that judgment in favor of George Herion and against Barbara Paulussen was on the basis of *stare decisis*. The Pennsylvania Supreme Court, in the case of *Astemborski* v. *Susmarski,* 502 Pa. 409, 466 A.2d 1018 (1983), upholds the constitutionality of 42 Pa.C.S.A. §6704(b), as amended.

On October 26, 1984, the Superior Court of Pennsylvania, following *Astemborski,* supra, found that the mother's support action on behalf of Georgeanne was time-barred by the statute of limitation (Jur. State App. A-2 to a-4).

On November 23, 1984, Barbara Paulussen filed a Petition

for Allowance of Appeal to the Supreme Court of Pennsylvania. It was denied on April 21, 1985 (Jur. State App. C, a-8). Notice of Appeal, to this Court was filed with the Superior Court on June 6, 1985 (Jur. State App. D, a-9). This case was docketed in the Supreme Court on July 17, 1985. This Court noted probable jurisdiction on October 15, 1985.

SUMMARY OF ARGUMENT

In Pennsylvania when Barbara Paulussen filed the support action on behalf of Georgeanne, a child born out of wedlock, could receive support from his or her father only if someone had commenced an action on his or her behalf within six (6) years from birth, or two (2) years from the last acknowledgement of paternity or payment of support. A child born in wedlock is entitled to support throughout minority, and under certain circumstances beyond, for college, or if handicapped or ill. Such a distinction lacks a substantial relationship to any permissible state interest.

This Court has held unconstitutional one and two year statutes of limitation for paternity actions, but has never held that longer periods are constitutional. The only conceivable state interest, protection against stale or fraudulent claims, is totally obviated by advances in scientific testing which make blood tests to establish (as opposed to exclude) paternity extremly accurate, and by the rights to jury trial and effective assistance of counsel.

To treat children born out of wedlock any differently in their rights to support and inheritance than children born to parents who are married to one another at the time of conception, fosters irresponsibility of parents toward their children and burdens the Government with support that can and should be furnished by parents.

ARGUMENT

A statute of limitation of six years from birth in an action for child support of illegitimate children violates the Equal Protection Clause of the Fourteenth Amendment and a two-year statute of limitation extension for an action for child support against a father who acknowledges paternity violates the Equal Protection Clause of the Fourteenth Amendment.

Under English common law, an illegitimate child, a bastard, suffered many legal disabilities directly related to his having been born out of wedlock. As Sir William Blackstone notes in his eighteenth century treatise, *Commentaries on the Laws of England* at 458-459:

> I proceed next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody, and sometimes called filius nullius, sometimes filus populi.

The six-year limitation period in the Pennsylvania paternity statute, 42 Pa.C.S.A. §6704(b), carries over the common law doctrine of filius nullius.[2] By operation of law, solely on the basis of an untimely filing of a paternity suit, eleven-year old Georgeanne Paulussen has been barred from an adjudication of her paternity. She has been stigmatized as an illegitimate child by her inability to use her father's surname, as well as by her permanent status as a child with one legal parent.

If she had been born in wedlock, she would have been entitled to support from her father at any time up to age eighteen and beyond. 48 P.S. §131. Under certain circumstances, she might even be entitled to funds for higher education after her eighteenth birthday. *Com. ex rel. Stump v. Church,* 333 Pa. Super. 166, 481 A.2d 1358 (1984). If she had been born in wedlock, she would be entitled to sue her father for support in the event she has the misfortune to become physically or mentally incapable of holding a job or a welfare case. *In re McCready's Trust,* 387 Pa. 107, 126 A.2d 429 (1958). If the mother becomes sick or disabled, Georgeanne will have to look to the state for her support. Her father remains free of any legal obligation to her because of a statutory barrier. But for the statute of limitations, both her mother and her father would have an equal responsibility to support her in accordance with their respective earning capacity and financial ability. *Com. ex rel. Lyle v. Lyle,* 248 Pa. Super. 458. 375 A.2d 187 (1977); *Melzer v. Witzberger,* 505 Pa. 462, 480 A.2d 991 (1984).

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[2]In 1978, the Pennsylvania legislature repealed § 4323 of the Crimes Code, 18 Pa. C.S.A. § 4323 relating to neglect to support a bastard child, 42 Pa. C.S.A. § 6601 et seq. The Civil Procedural Support Act was made the exclusive law for governing paternity actions. The criminal forum was no longer available for the adjudication of paternity. Later, to Civil Procedural Support was amended by Act of October 5, 1980, PL. 69, No. 142 to add subsections (e) (f) and (g) to § 6704 to narrow the application of the Statute of Limitation to children "born out of wedlock." The civil procedure rules that pertain to the litigation of support actions including those involving illegitimate children are set forth at 42 Pa. C.S.A., Pa. R.C.P. 1910.1 to 1910.31. On October 31, 1985, child support laws were amended by Pennsylvania legislature and the section pertaining to the Statute of Limitation is a paternity action was made part of Title 23 of Purdon's Pennsylvania Statutes.

In Pennsylvania, the statute of limitation is a complete defense to a claim for support of an illegitimate child. Barbara Paulussen has been precluded from presenting evidence that George Herion is the natural father of Georgeanne despite the strength of her evidence and Georgeanne's ongoing need for additional financial support.

This Court has consistently acted to invalidate laws which discriminate against illegitimate children as unconstitutional unless a state can justify its disparate treatment on a basis of a substantial state interest. *Pickett v. Brown,* 462 U.S. 1 (1983), *Mills v. Habluetzel,* 456 U.S. 91 (1982), *United States v. Clark,* 445 U.S. 23 (1980), *Trimble v. Gordon,* 430 U.S. 762 (1977), *Mathews v. Lucas,* 427 U.S. 495 (1976), *Jiminez v. Weinberger,* 417 U.S. 628 (1974), *New Jersey Welfare Rights Org. v. Cahill,* 411 U.S. 619 (1973), *Gomez v. Perez,* 409 U.S. 535 (1973), *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972), *Glona v. American Guarantee & Liability Insurance Co.,* 391 U.S. 72 (1968), *Levy v. Louisiana,* 391 U.S. 68 (1968).

This Court has recognized that state laws are ordinarily presumed to be valid when challenged under the Equal Protection Clause. *Parham v. Hughes,* 441 U.S. 347 (1979). However, the presumption of validity is not present if the statute contains classifications based solely upon the status of illegitimacy. "The basic rationale of these decisions is that it is unjust and ineffective for society to express its condemnation of procreation outside of the marital relationship by punishing the illegitimate child who is in no way responsible for his situation and is unable to change it." *Parham v. Hughes, supra* 441 U.S. at 352.

This Court explains why illegitimacy is a semi-suspect classification in *Pickett v. Brown,* 462 U.S. 1 (1983) at 8, as follows:

> In view of the history of treating illegitimate children less favorably than legitimate ones, we have subjected a statutory classification based on illegitimacy to a heightened level of scrutiny.

The *Pickett* Court further notes that a standard of review of more than ordinary scrutiny of a classification based on illegitimacy had been applied to the statute in the *Mills v. Habluetzel,* 456 U.S. 91 (1982), "We stated that restrictions on support suits by illegitimate children will survive equal protection to the extent they are substantially related to a legitimate state interest (citation omitted)" (462 U.S. at 8).

When the Court vacated judgment in *Astemborski v. Susmarski,* 103 S. Ct. 3105 (1983), and remanded the matter to the Pennsylvania Supreme Court, this Court specifically directed the Pennsylvania Court to consider *Pickett v. Brown,* supra. However, the Pennsylvania Supreme Court, in its reconsideration at *Astemborski v. Susmarski,* 502 Pa. 409, 466 A.2d 1018 (1983) arrived at the same holding it had reached prior to remand. That Court held that the Pennsylvania statute did not violate equal protection rights of illegitimate children. In arriving at this conclusion, the Pennsylvania Court took the point-of-view of a minority of state jurisdictions. Most states that had considered the constitutionality of a statute of limitations in a paternity statute have concluded that a short limitation period was a violation of the guarantees of equal protection to illegitimate children.[1]

In upholding the statute, the Pennsylvania court did not exhibit the special concern for illegitimates that is mandated by this Court. Instead, the *Astemborski* court remained apathetic and indifferent to the discriminatory impact of the statute on the rights of illegitimate children when it states:

> "It is true that the legislative scheme of this statute will preclude certain claims from being successfully asserted. In the case at bar, the mother, representing her child, could have initiated a support action at any time prior to December 30, 1980, when she assigned her support rights to the Commonwealth. Because she neglected to do this, for whatever reason, her child is now prevented forever from asserting a successful claim for support against the alleged father, at least in the absence of any estoppel or statutory exceptions. We do not address the wisdom of the legislative scheme, but only its constitutionality. Since the statute is substantially related to a legitimate state interest, viz., the prevention of stale or fraudulent paternity claims, it is not constitutionally infirm under a Fourteenth Amendment challenge even though the statute may operate, as it has in this case, to deprive an illegitimate child of its right to make a claim for support beyond the six year limit." (502 Pa. at 417-418, 466 A.2d at 1022).

The Pennsylvania Supreme Court's holding does not comport with the guidelines for equal protection analysis in *Pickett.* That analysis is based on this Court's prior holdings regarding invalidation of any legislative scheme which creates an impenetrable barrier between an illegitimate child and his rights to enforce a child support obligation against his father. In *Gomez v. Perez,* 489 U.S. 535 (1973) at 538, the Court states:

> We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is "illogical and unjust." (citations omitted".

In *Mills v. Habluetzel,* 456 U.S. 91 (1982), the Court reviewed the one-year statute of limitations for paternity suits

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[1]States which have held that statutes of limitation for paternity actions are unconstitutional include North Carolina [*County of Lenoir ex rel. Codgell v. Johnson,* 46 N.C. App. 182, 264 S.E.2d 816 (1980)]; Florida [*State Dept. of Health & Rehabilitation Services* on behalf of *Gillespie v. West,* 378 So.2nd 1220 (1979)]; New Mexico [*Stringer v. Dudoich,* 92 N.M.98, 583 P.2d 462 (1978)]; Oregon [*State ex rel. Adult and Fam. Serv. v. Bradley,* 58 Or.App. 663,650 P.2d 91 (1982), 1-year]; Indiana [*Matter of M.D.H.,* 437 N.E.2d 119 (Ind. App. 1982)]; District of Columbia [*District of Columbia ex rel. W.J.D. v. E.M.,* 467 A.2d 457 (D.C. App. 1983)]; Illinois [*Dornfeld v. Julian,* 104 Ill.2d 261,472 N.E.2d 431 (1984)] 3-year statute; New York [*Matter of Patricia R. v. Peter W.,* 126 Misc.2d 87,480 N.Y.S.2d 1020 (1983)]; and Oklahoma [*Callison v. Callison,* 687 P.2d 106 (Okla. 1984)], 3-year statute; Kentucky [*Com. Ex rel. Lepard v. Young,* 666 S.W.2d 735 (Ky. 1983)]; and Maryland [*Frick v. Maldonado,* 296 Md. 304, 462 A.2d 1206 (1983)] 2-year statute.

which the Texas legislature had enacted in response to the decision in *Gomez*. This statute was found violative of illegitimate childrens' rights to equal protection under the laws.

In an opinion by Justice Rehniquist in which Chief Justice Burger and Justices Brennan, White, Marshall, Blackmun, Stevens and O'Connor joined, this Court found the Texas legislation gave illegitimates such limited support rights from their fathers as to render them nonexistent for all practical purposes. One year was too short a time period in which illegitimate children could reasonably be expected to exercise their statutory rights to bring a support action against their fathers.

During the following term in *Pickett v. Brown*, 462 U.S. 1 (1983), Justice Brennan, for a unanimous court, found a two-year statute of limitation in a Tennessee Paternity statute was violative of the Equal Protection Clause of the Fourteenth Amendment. At 9, the *Pickett* Court sets out the requirements which a period of limitations in a paternity statute must satisfy to meet constitutional standards:

> The equal protection analysis focused on two related requirements: the period for obtaining paternal support has to be long enough to provide a reasonable opportunity for those with an interest in illegitimate children to bring suit on their behalf; and any time limit on that opportunity has to be substantially related to the State's interest in preventing the litigation of stale or fraudulent claims (citations omitted).

In *Astemborski*, 502 Pa. at 416, 466 A.2d. at 1021, the Court, ignoring all the cues in *Mills, supra* and *Pickett, supra* states as follows: "Examining this Commonwealth's six-year statute of limitations in light of these requirements, we find no denial of equal protection."

In *Mills v. Habluetzel*, supra, Justice O'Connor, in a concurring opinion in which Chief Justice Burger and Justices Brennan and Blackmun joined and in part 1 of which Justice Powell joined, notes that the Court, in disapproving of a two-year statute of limitations, is not prospectively approving the new four-year statute of limitation enacted by the Texas legislature during the pendency of the *Mills* litigation. The concurring opinion states:

> Today, this Court holds that a Texas statute prescribing a one-year statute of limitation for paternity suits violates the

Equal Protection Clause of the Fourteenth Amendment. Although I agree with the Court's analysis and result, I write separately because I fear that the opinion may be misinterpreted as approving the four-year statute of limitation now used in Texas (citation omitted). 436 U.S. at 102.

The *Astemborski* Court found that six years was constitutionally sufficient because it was a "period of limitation of such greater duration as to negate birth-related encumbrances." This finding is a result of the *Astemborski* Court's oversimplification of the factors that could motivate an unwed mother to delay the filing of a paternity suit. The court did not acknowledge that financial difficulties, loss of income, continuing affection for the child's father, or a desire to avoid disapproval of family and community can continue to be a part of an unwed mother's problems until her illegitimate child is economically and emotionally self-sufficient.

In her concurring opinion to *Mills*, Justice O'Connor outlines several different factual scenarios that might lead to a late filing of a paternity action on behalf of an illegitimate child. None of these scenarios are in the control of the child.

> Finally, the practical obstacles to filing suit within one year of birth could as easily exist several years after the birth of the illegitimate child. For example, if, because of the continuing relationship between the natural father and the mother, the father has provided the child with financial support for several years, the mother understandably would be unlikely or even unwilling to jeopardize her relationship with the child's father by filing a paternity suit in order to protect her child's right to financial support at some indeterminate future date. Alternately, the child may have lived with the father alone or his relatives for a number of years, a situation that leaves the child obviously unable to sue his father to establish paternity. The risk that the child will find himself without financial support from his natural father seems as likely throughout his minority as during the first year of his life.

A review of the factors used in deciding that the one-year statute of limitation cannot withstand an equal protection challenge indicates that longer periods of limitation for

paternity suits may also be unconstitutional. In short, there is nothing special about the first year following birth that compels the decision in this case." 456 U.S. at 105-106.

As Justice O'Connor stated, children have an ongoing need for support from their fathers throughout their minority. The *Astemborski* Court ignored children's ongoing needs when it upheld the constitutionality of a statute that forfeits children's support their rights after sixth birthday. Evidently, that court believed that after children are six, they do not need shoes, food, or shelter. This is contrary to the well-known fact that the financial needs of children *increase* with age rather than decrease.

The Pennsylvania statute also makes the mother totally responsible to act in the child's best interest to pursue his support rights when doing so might not be in her best interest. The mother is put into the position of a fiduciary or trustee of the child. In the context of child custody, the Pennsylvania courts ordinarily use a "best interests of the child" standard. *Com. ex rel. Parikh v. Parikh,* 449 Pa. 105, 296 A.2d 625 (1972). This term has been defined as including the child's physical, intellectual, moral and spiritual well-being. *Hartman v. Hartman,* 328 Pa. Super. 154, 476 A.2d 938 (1984). Even the welfare of an illegitimate child is to be guided by "the best interests of the child" standard. *Albee Appeal,* 189 Pa. Super. 370, 150 A.2d 563 (1959). Usually the state will assume the responsibility of assuring that the child's welfare is to be paramount, and the rights of his parents are subordinate to the best interest of the child. *Com. ex rel. Staunton v. Austin,* 209 Pa. Super. 187, 233 A.2d 892 (1966). Also, in disputed child custody matters, a mother is no longer presumed to be the better custodial parent *Ellerbe v. Hooks,* 490 Pa. 363, 416 A.2d 512 (1980); *Com. ex rel. Spriggs v. Carson,* 490 Pa. 290, 368 A.2d 635 (1977). It is only in the context of pursuing rights on behalf of an illegitimate child that the court has allowed such a presumption to stand. The young child is left totally dependent upon the good graces of his mother. Therefore the requirements of the first part of the equal protection test have not been satisfied by a six year from birth statute of limitations as this time period is not a reasonable time-frame in which illegitimate children can exercise their rights to support.

In order to withstand an equal protection challenge and to

satisfy the second prong of the two-part test, the six-year limitation period must be substantially related to a permissible state interest. The only state interest that the court will accept as having any rational relationship to a statute of limitations for illegitimates is the prevention of the litigation of stale or fraudulent claims. However, a close look at the language of *Mills, supra* and *Pickett, supra* demonstrates that this Court does not find this state interest sufficient to outweigh the rights of illegitimate children to support from their biological fathers.

The *Mills* Court states as follows: "Although the need for proof of paternity distinguishes legitimate from illegitimate children in their claims for child support, the State's asserted justification is neither sufficiently weighty nor substantially related to the limitation to uphold the statute under the Fourteenth Amendment." 456 U.S. at 102. Three distinct arguments show that the spurious claims justification is no longer valid. First, there are more important state interests at stake that suffer as a result of having a statute of repose for paternity claims. Next, great scientific strides have made identification of parentage easier. Finally, legislative changes indicate that previous concerns regarding proliferation of spurious claims are anachronistic.

Justice O'Connor raised the issue of the counter balancing state interests in the concurring opinion to *Mills,* at 103-104. Her points were reiterated and adopted by the unanimous Court in *Pickett.* These state interests include the state's obligation to protect the public fisc and the state's obligation to do justice and litigate genuine claims.

In seeking to protect the rights of a fractional number of accused, putative fathers, the state has exposed taxpayers to the enormous financial liability of having to support a large number of illegitimate children.[4] A statute of limitations acts to release the responsible party—the father—from his moral obligations

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[4]The class of illegitimate children whose rights are potentially affected by statutes of limitation on paternity action is growing rapidly. In 1950, the total percentage of births of illegitimate children as compared to legitimate children was four percent (4%). By 1970, the percentage of illegitimate children had increased to ten point seven percent (10.7%). By 1980, the percentage stood at eighteen point four percent (18.4%). U.S. Department of Commerce, *Statistical Abstract of the United States,* Table 97, p.70.

to support his child. Such a social policy only acts to discourage fathers from acknowledging their illegitimate children, supporting them or marrying their mothers. If a father does those things, he incurs an absolute obligation to pay child support. If he doesn't, there is a chance that he will never have to pay one penny toward the support of his child.

The main justification the *Astemborski* court presents for the six-year limitation period is that trial evidence needed by the putative father is uniquely susceptible to deterioration over time. Without any further factual explanation, the *Astemborski* Court states that:

> While the passage of one or two years could not be regarded as appreciably increasing the likelihood of fraudulent claims, a lapse of more than six years may reasonably be expected to coincide with prejudice to the defense through loss of evidence, the death or disappearance of witnesses, and the fading of memories. (502 Pa. at 417, 466 A.2d at 1022).

This conclusion appears to contradict the Pennsylvania Superior Court's recognition of the reliability of scientific evidence in other decisions. For example, in *Turek v. Hardy,* 312 Pa. Super. 158, 458 A.2d 562 (1983), the Pennsylvania Superior Court held that the results of the HLA, "Human Leukocyte Antigen" tests could be introduced as affirmative evidence of paternity.

This Court has recognized the impact of scientific evidence on the state's interest in prevention of spurious claims. In *Pickett* at 17, this Court states as follows: "Finally, the relationship between a statute of limitations and the State's interest in preventing the litigation of stale and fraudulent claims has become more attenuated as scientific advances in blood testing have alleviated the problems of proof surrounding paternity actions."

As Justice O'Connor pointed out in the *Mills* concurring opinion which is cited by the *Pickett* court at 426 U.S.11. These advances have ("dramatically reduc(ed) the possibility that a defendant will be falsely accused of being the illegitimate child's father." Id., at 104, N.2.) See also *Little v. Streater,* 452 U.S. 1, 6-8, 12, 14 (1981). In *Pickett* at 17 n.16, the court cites a sentence from an article stating "Recent advances in scientific technology now enable the properly equipped laboratory to routinely provide attorneys and their clients with a 95-98 percent

probability of excluding a man falsely accused of paternity."

Therefore, the existence of these tests with their high statistical ability to eliminate great numbers of potential fathers from being the targets of false and fraudulent claims weakens the relationship between a limitation period in a paternity statute and the state's interest in preventing spurious claims. This relatively weak state interest cannot be balanced against the withholding of important rights from a large class of illegitimate children. The Pennsylvania six-year statute of limitations must be invalidated.

Furthermore, the rights of the accused, putative fathers are well protected under Pennsylvania law. First, the defendant putative father has the right to demand a jury trial. 42 Pa.C.S.A., Pa.R.C.P. 1910.15(b). At the time of trial, his paternity must be proven by a preponderance of the evidence 42 Pa.C.S.A., Pa.R.C.P. 1910.15(b). He has the right to demand blood tests for himself, the child, and the mother. 42 Pa.C.S.A. 6131 et. seq. In addition, under Pennsylvania law, paternity cannot be determined against the father on the basis of a default for failure to answer the complaint. 42 Pa.C.S.A., Pa.R.C.P. 1910.7. If he cannot afford the costs of blood tests, the state will pay. 42 Pa.C.S.A. 6131 et. seq., *Little v. Streater,* 452 U.S. 1 (1981). Once evidence of the results of the blood tests is admitted and he is excluded as a potential father, the case against him will be immediately dismissed. 42 Pa.C.S.A. 6131 et seq.,

The indigent putative father also has a right to counsel during the paternity action. *Corra v. Coll,* 305 Pa. Super. 179, 451 A.2d 480 (1982). A non-indigent putative father also must be given a reasonable opportunity to secure counsel for a paternity trial. The putative father also has the right to challenge the court finding on the basis of ineffective counsel. *Banks v. Randle,* 337 Pa. Super. 191, 486 A.2d 971 (1985); *Bohm v. Lunger,* 490 A.2d 465 (Pa. Super. 1985). These procedural safeguards ensure that the accused, putative father will get a fair trial and decrease his vulnerability to fraudulent claims.

The state's interest in the prevention of the litigation of spurious claims has been further weakened by the recent legislative changes. On August 16, 1984, Congress passed a law mandating that all states enact procedures wherein children can prove their

paternity to age eighteen, 42 U.S.C. §666(a)(5). On October 31, 1985, the Pennsylvania legislature, changed the statute of limitations for paternity actions from six years to eighteen years. The section giving illegitimate children two years from the date of the putative father's last acknowledgement of paternity or financial contribution to institute suit was deleted.

The new Pennsylvania legislation is silent on its retroactive application, so it does not moot the issue *sub judice*. Without a finding of unconstitutionality of 42 Pa.C.S.A. §6704(b)(as amended), a great number of valid claims which can be brought by illegitimate children will remain foreclosed and forfeited. Therefore, in view of the foregoing reasons, the Pennsylvania six-year statute of limitation must be found unconstitutional. Illegitimate children should have the same opportunity to receive child support from their fathers as legitimate children.

CONCLUSION

The judgment of the Pennsylvania Superior Court, insofar as its affirming the trial court's dismissal of Appellant's original Petition should be reversed.

Respectfully submitted,

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November, 1985

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BRIEF

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No. 85-88

In The
Supreme Court of the United States
October Term, 1984

BARBARA ANN PAULUSSEN,
Appellant,

vs.

GEORGE RONALD HERION,
Appellee.

On Appeal from the
Superior Court of Pennsylvania

APPELLEE'S BRIEF ON THE MERITS

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STATEMENT OF QUESTIONS PRESENTED

1. Does a State paternity statute of limitations of six years from birth or within two years of acknowledgement of paternity provide a reasonable time period for interested parties to bring suit on behalf of illegitimate children, and is that time limit substantially related to the State's interest in preventing the litigation of stale or fraudulent claims so as not to offend the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the six year statute of limitations for paternity was rendered unconstitutional by the subsequent enactment of a statute generally tolling statutes of limitations during minority.

3. Whether the new State statute of limitations for paternity actions renders fathers of illegitimate children liable for back payments for child support.

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STATEMENT OF THE CASE

On February 11, 1980, Appellant filed a Petition for Support of her illegitimate child born March 5, 1972. (J.A. 1) The Petition claimed that Appellee was the father of the child and that he last contributed to the child's support in April, 1975. (J.A. 1-2) The Petition was filed approximately five years after alleged support payments stopped and approximately eight years after the birth of the child. Appellee filed Preliminary Objections to the Petition on the basis that Appellant's claim was barred by the applicable statute of limitations contained in 42 Pa. Con. Stat. Ann. § 6704(e), now repealed and supplanted by 42 Pa. C.S.A. § 6704(b). (J.A. 3-4)

The Court of Common Pleas overruled the Preliminary Objections on a technical basis and gave leave to the Appellee to file an Answer to the Petition and to raise the defense of the statute of limitations by way of New Matter as a bar to the support action. (J.A. 9) Appellee did file an Answer denying paternity and each of Appellant's allegations, stating only that there was no contribution to the support of Appellant's child at least from April, 1975 to the present. (J.A. 10-12) Appellee's Answer also contained New Matter raising the defense of the statute of limitations pursuant to the applicable Pennsylvania statute. (J.A. 12) Appellant replied to the New Matter, challenging the constitutionality of the Pennsylvania statute. (J.A. 13)

Subsequently, both parties filed Motions for Summary Judgment. (J.A. 15 and 27) The lower Court granted Appellee's Motion for Summary Judgment on the ground that Appellant's claim was barred by the statute of limi-

tations. (J.A. 32) Appellant's motion for Summary Judgment was denied. (J.A. 32) There was never any trial on the merits and at all times pertinent thereto, Appellee denied paternity. (J.A. 10-11, 82) A Petition for Reconsideration having been denied by the lower Court, Appellant filed an appeal to the Superior Court of Pennsylvania. By written opinion filed October 26, 1984, the Superior Court of Pennsylvania affirmed the Order of the lower Court. (J.A. 7) Appellant thereafter filed a Petition for allowance of appeal in the Supreme Court of Pennsylvania which was denied on April 21, 1985. (J.A. 7) This appeal followed.

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SUMMARY OF ARGUMENT

Appellee concedes that he is potentially liable to pay child support on a going-forward basis as a result of the new Pennsylvania statute of limitations for paternity actions, Act 66 § 1, enacted on October 30, 1985. Appellee contends, however, that he has no potential liability for child support dating back to the time appellant filed her suit in 1980 because at that time the suit was barred by a valid statute of limitations.

The Pennsylvania statutory scheme in effect in 1980 differed significantly from the statutory schemes struck down in *Mills v. Habluetzel,* 456 U.S. 91 (1982) and *Pickett v. Brown,* 462 U.S. 1 (1983). It had three features which demonstrates that it did not impose excessive or unfair burdens on the opportunity of illegitimate children to obtain child support. First, it had a six year, rather than

a one or two year, statute of limitations. This longer time period eliminates the "birth related" problems cited by this court in *Mills* and *Pickett.* Second, the Pennsylvania statute provided that child support could be sought two years after the father last contributed support regardless of the minor's age, thus eliminating another set of concerns cited in *Mills.* Finally, in Pennsylvania in 1980, as opposed to Texas and Tennessee, there was no general provision for tolling the statute of limitations during infancy and thus no singling out of illegitimate children for special burdens.

The Pennsylvania statute of limitations served significant state interests. Despite the increased reliability of blood tests, there is often the need for other evidence to resolve the issue of paternity. Such evidence may become increasingly unavailable in six years. Statutes of limitations also serve the purposes of maintaining "settled expectations" and "preventing surprises." These purposes are of particular significance to fathers of illegitimate children who, unlike fathers of legitimate children, may often not know that they are fathers and, in some cases, may not even know prior to suit that the child in question was born.

It is true that states have a countervailing interest in increasing child support payments in order to reduce welfare payments. But it is up to the state to determine the extent to which concern for fairness to the father outweighs the state's fiscal concerns. States often make fiscal sacrifices in order to be fairer to fathers—*e.g.,* by limiting the percentage of a father's income available for child support. In conclusion, therefore, the Pennsylvania statute

of limitations in effect when appellant brought this suit in 1980 was constitutional.

The two significant developments since the filing of appellant's suit do not alter appellee's lack of liability for pre-1985 child support payments. The new statute of limitations for paternity actions does not require payment child support for periods prior to its effective date. Otherwise a mother of a 17 year old child could now apply for back payments at least from the date such a claim would have been time-barred. The fact that appellant filed a time barred suit in 1980 does not, under Pennsylvania law, place her in a better position.

Nor did the fact that Pennsylvania in May 1984 adopted a general statute tolling the statute of limitations for minors render the statute of limitations for paternity actions unconstitutional. A state is not required to change all its laws at once in order to retain the necessary consistency for purposes of equal protection analysis. A state must be given a reasonable period of time to understand and address any inconsistencies created by the enactment of a new statute. Here the state resolved the inconsistencies promptly by enacting a new statute of limitations for paternity actions. Thus the six year statute of limitations which was constitutional when enacted, did not become unconstitutional in May 1984 or at any time prior to the enactment of the new statute of limitations.

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ARGUMENT

Introduction

In 1984, Congress enacted legislation requiring states participating in the federal AFDC program to adopt procedures "which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday." The Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305, § 466(a)(5). Pursuant to the congressional amendments, the Pennsylvania legislature, on October 30, 1985, amended its statute of limitations for paternity actions to allow such actions to be brought before a child's eighteenth birthday. Act 66 § 1. This act becomes effective on December 31, 1985. Act 66 § 4. House Bill No. 98, Session 1985, printer No. 2227.

Appellee concedes that as a result of Act 66, he is potentially liable for child support payments on a going-forward basis in an action brought after December 31, 1985. Appellee contends, however, that he is not potentially liable for child support payments dating back to February 11, 1980 when appellant filed her Petition for Support. At the time this Petition was filed it was barred by a constitutionally valid statute of limitations. In enacting a new statute of limitations, Pennsylvania did not intend to render appellee liable for back child support payments.

I. Pennsylvania's Six-year Statute of Limitations for Paternity Actions was Constitutional

In *Mills v. Habluetzel,* 456 U.S. 91 (1982) and *Pickett v. Brown,* 462 U.S. 1 (1983), this Court struck down one

and two-year statutes of limitations for paternity actions as violative of equal protection. In *Pickett,* the Court stated that its equal protection analysis focused on two related requirements:

> "The period for obtaining parental support has to be long enough to provide a reasonable opportunity for those with an interest in illegitimate children to bring suit on their behalf; and, any time limit on the opportunity has to be substantially related to the State's interests in preventing the litigation of stale or fraudulent claims." 103 S. Ct. at 2204

The six-year statute of limitations which barred appellant's Petition was part of a statutory scheme significantly different from the statutory schemes struck down in *Mills* and *Pickett.* It had three features which demonstrate that it did not impose excessive or unfair burdens on the opportunity of illegitimate children to obtain child support and it clearly serves the state's interest in preventing stale and fraudulent claims.

The first feature of the statutory scheme was a six-year, rather than a one or two year, statute of limitations. This enlarged time period eliminated the "birth-related" obstacles to suit cited by this Court in *Mills* and *Pickett.* Such obstacles as the financial difficulties caused by child birth expenses or birth-related loss of income, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of child, *Mills, supra,* 456 U.S. at 100; *Pickett, supra,* 103 S. Ct. at 2206, are unlikely to remain insurmountable for six years.

Second, the Pennsylvania statute provided that child support could be sought two years after the father last

contributed support, regardless of the minor's age. This provision eliminated the obstacle to suit which might arise if the father provided the child with support from many years and the mother understandably refused to "jeopardize her relationship with the child's father by filing a paternity suit in order to protect her child's right to financial support at some indeterminate future date." 456 U.S. at 105 (O'Connor J., concurring). It also dealt with the problem of a child who is cut off from support by his father after having lived with the father alone for many years. *Ibid.*

Finally, in Pennsylvania in 1980, as opposed to Texas (*Mills*) and Tennessee (*Picketi*), there was no general provision for tolling the statute of limitations during infancy. *See* 42 Pa. C.S. Sec. 5533.[1] Thus, this was not a situation where "[o]f all the difficult proof problems that may arise in civil actions generally, paternity, an issue unique to illegitimate children, is singled out for special treatment." *Mills supra,* 456 U.S. at 104 (O'Connor, J., concurring). *See Astemborski v. Susmarski,* 502 Pa. 409, 466 A.2d 1018, 1021 n.3 (1983). In terms of the Court's equal protection analysis, Pennsylvania gave illegitimate children as much opportunity to obtain child support as it gave other children to obtain other forms of judicial relief.

Moreover, the six-year statute of limitations served significant state interests by protecting against stale and fraudulent paternity claims. In *Mills supra* 456 U.S. at

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[1] In 1984, Pennsylvania enacted legislation providing for the tolling of statutes of limitations during infancy. *See* discussion *infra* at 11.

98-99, this Court recognized that paternity claims pose potential problems:

> Paternal support suits on behalf of illegitimate children contain an element that such suits for legitimate children do not contain: proof of paternity. Such proof is often sketchy and strongly contested, frequently turning upon conflicting testimony from only two witnesses. Indeed, the problems of proving paternity have been recognized repeatedly by this Court.

The Supreme Court of Pennsylvania, in upholding the six-year statute of limitations, explained the state's interests in the following terms:

> Notwithstanding [recent advances in blood and genetic testing] a period of limitations remains necessary, for in cases where test results do not exclude a certain male from the class of possible fathers, that male must rely on conventional forms of evidence as proof of nonpaternity, viz. evidence of lack of access to the mother, as well as his own testimony and the testimony of others. With regard to these conventional forms of proof, the state has a clear interest in having claims litigated while evidence remains available and fresh. *Astemborski v. Susmarski, supra,* 466 A.2d at 1021. [citations omitted].

Pennsylvania has an additional interest in its six-year statute of limitations. The purpose of a statute of limitations is not merely to assure the accuracy of the fact-finding process; it also serves the purpose of maintaining "settled expectations" and "preventing surprises". *See Board of Regents v. Tomanio,* 446 U.S. 478, 487 (1980); *Burnett v. New York Central Railroad Co.,* 380 U.S. 424, 428 (1965). This policy of repose has a greater significance for fathers of illegitimate children than for fathers of legitimate children. Fathers of illegitimate children

may often not know they are fathers. In some cases, they may not know prior to a paternity action that the child in question was born. It poses an unfair hardship on these fathers to suddenly subject them to paternity actions more than six years after their child's birth, since they have had no opportunity to plan financially for their parental responsibilities.

It is true that states have a countervailing interest in assuring that genuine claims for child support are satisfied so as to reduce the number of individuals forced to enter the welfare roles. *Mills supra,* 456 at 104 (O'Connor J., concurring). But it is up to the state to determine the extent to which concern for fairness to the father outweighs the state's fiscal concerns. States often make fiscal sacrifices in order to be fairer to fathers—*e.g.* by limiting the percentage of a father's income available for child support. It should also be noted that if a state's sole concern were welfare payments, it should abolish statutes of limitations in any type of damage action brought by a mother on welfare. Of course, due to concerns for fairness to defendants, no state has done this.

In conclusion, when appellant filed her Petition in 1980, the statute of limitations which barred it was constitutional.

II. The Six-year Statute of Limitations for Paternity Actions Was Not Rendered Unconstitutional by the Subsequent Enactment of a Statute Generally Tolling Statutes of Limitations During Infancy.

In May 1984, Pennsylvania adopted legislation generally tolling statutes of limitations during infancy. 42 Pa. C.S. Ann. § 5533(b) (Purdon Supp. 1985). The new

statute undermines to some degree the argument that "in Pennsylvania, paternity actions are treated no differently from the vast majority of actions brought on behalf of a child". *Astemborski v. Susmarski, supra,* at 1021 n.3. Appellee contends, however, that the enactment of the new statute did not render unconstitutional the six-year statute of limitations for paternity actions.

It must be reemphasized that when the six-year limitations on paternity actions was enacted in 1978, it was not inconsistent with the general policy for suits brought by minors. Thus, it cannot be contended that the legislation was enacted with an improper motive to single out paternity actions for special treatment. When a state has a consistent and constitutional policy, it should be given some leeway to experiment—to change certain aspects of its policy without changing all of them. As this Court noted in *McDonald v. Board of Election Com'rs of Chicago,* "a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind'." 394 U.S. 802-809 (1969), (quoting *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489 (1955)).

At some point, based on the results of its experiment, the state may become constitutionally required to change its policy across the board. It may learn that its policy is not advancing any state interests. Thus, if Pennsylvania found that the tolling of statutes of limitations for minors in malpractice and other cases did not pose undue problems of proof or impose unfair hardships, it might then be constitutionally required to change the six-year statute of limitations for paternity actions. In actuality,

of course, Pennsylvania changed the six-year statute of limitations for paternity actions within a year and a half of its new tolling provision for minors.

It should also be noted that the record does not suggest that the Pennsylvania courts ever addressed the inconsistency between the two statutes or that the issue was ever considered by the legislature. A state should be given a reasonable opportunity to address any inconsistencies created by the enactment of a new statute before a separate existing statute is declared unconstitutional.[2]

III. The New Statute of Limitations for Paternity Actions Does Not Render Appellee Potentially Liable for Back Payments for Child Support.

The new Pennsylvania statute of limitations for paternity actions, effective December 31, 1985, does not generally provide for back payments for child support. Otherwise, the mother of a seventeen year old child could now file a claim for back payments at least from the time such a claim would have been time barred.[3] Appellee contends that the legislature did not intend that a person should be liable for back child support payments simply because a time barred suit was previously filed.

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[2] If this Court determines that the six-year statute of limitations for paternity actions was rendered unconstitutional by the new tolling provision for minors, appellee's potential liability should, of course, commence on the effective date of the new provision —June 30, 1984.

[3] Under Pennsylvania law the mother could file for child support on a going-forward basis. *See e.g., Jennis v. Stillman,* 306 Pa. Super. 431, 452 A.2d 801 (1982); *Williams v. Wolfe,* 297 Pa. Super. 270, 443 A.2d 831 (1982).

Neither appellant nor *amici* cite any Pennsylvania authority which would suggest a contrary legislative intent. *Amici* correctly cite Pennsylvania cases for the proposition that legislation enlarging the statute of limitations revives claims that were previously extinguished and permits the filing of a *new* claim. Br. for *Amici,* 28-29. But no case suggest that back payments are required. Indeed, a leading Pennsylvania case emphasizes that "because the claim for support monies refers back only to the date of the filing of the complaint [which was one year *after* enactment of an enlarged statute of limitations] it cannot be said that the statute would be retroactive as to the duty of support prior to the effective date of the new act . . . ." *Williams v. Wolfe,* 297 Pa. Super. 270, 443 A.2d 831, 834 (1982).

CONCLUSION

For all the foregoing reasons, it is requested that this Court dismiss the appeal and affirm the decision of the Pennsylvania Superior Court.

Respectfully submitted,

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BRIEF

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No. 85-88

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BARBARA ANN PAULUSSEN,

Appellant,

v.

GEORGE RONALD HERION,

Appellee.

On Appeal from the Superior Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE ON BEHALF OF THE CHILDREN'S DEFENSE FUND AND THE WOMEN'S LEGAL DEFENSE FUND (In Support of Appellant)

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No. 85-88

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

BARBARA ANN PAULUSSEN,

Appellant,

v.

GEORGE RONALD HERION,

Appellee,

On Appeal From The
Superior Court Of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE ON BEHALF OF THE CHILDREN'S DEFENSE FUND AND THE WOMEN'S LEGAL DEFENSE FUND

Pursuant to Rule 36 of the Rules of this Court, the Children's Defense Fund (CDF) and the Women's Legal Defense Fund (WLDF) respectfully move this Court for leave to file the attached brief amici

curiae, in support of appellant, in the above-captioned case.

CDF is a national public charity representing and providing advocacy on behalf of low-income, minority, and handicapped children. The Fund works through litigation, public education, analysis of public policy and other methods to improve the care and development of children and their economic status. Experience in such work demonstrates that limitations on the right of children born out of wedlock to establish child support obligations, such as Pennsylvania's six-year statute at issue, have a host of grave social and economic consequences for such children.[1/]

1/ See, e.g., Trimble v. Gordon, 430 U.S. 762 (1977) (state gave no right to intestate succession); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (state gave no right to welfare to some children born out of wedlock); See also Marcus, Equal Protection: The Custody of the Illegitimate Child, 11 J. Fam. L. 1, 17-18 (1971) (alienation of such children).

WLDF is a tax-exempt organization which represents women and men challenging barriers to sexual equality, advocates on behalf of feminist legal principles, and conducts public education programs. The issues presented in the instant case are of enormous practical and legal significance to WLDF's client population and constituency.

If present trends continue, by the year 2000, one hundred percent of the nation's poor adults would be women mostly the heads of single-parent families.[2/] A major contributing factor to this "feminization of poverty"[3/] is the

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2/ National Advisory Council on Economic Opportunity, The American Promise: Equal Justice and Economic Opportunity (1981).

3/ Id.

widespread ineffectiveness of the child support enforcement system.[4/] Any unnecessary practical barrier to the establishment or enforcement of child support obligations, such as the six-year cut-off of the right to establish paternity at issue in this case, is of great concern.

This brief amici curiae presents two points, one relating to the Child Support Enforcement Amendments requiring States to have paternity statutes of limitation of no less than eighteen years, as recently implemented by Pennsylvania, and the other relating to aspects of the equal protection challenge to Pennsylvania's six-year statute. Movants bring to this brief their experience derived from their

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4/ Bureau of the Census, U.S. Dept. of Commerce, Child Support and Alimony: 1978, Current Population Reports, Series P-23, No. 106 (1980); see also L. Weitzman, The Marriage Contract: Spouses, Lovers and the Law 126-34 (1981).

involvement in the enactment of the federal Child Support Enforcement Amendments, as well as their expertise with application of the Equal Protection Clause to classifications based on illegitimacy and the "real-life" needs and problems of unwed mothers and their children seeking child support.

Respectfully submitted,

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November 27, 1985

Written consent for leave to file this brief amici curiae has been requested from appellant and appellee and has not been received.

QUESTIONS PRESENTED

(1) Does a statute of limitation of six years from birth in an action for child support for illegitimate children violate the Equal Protection Clause where no equivalent period of limitation for actions for child support by legitimate children exists?

(2) Does a two-year extension of a statute of limitation for child support following a father's acknowledgment of paternity violate the Equal Protection Clause where no equivalent period of limitation for support of legitimate children exists?

* * *

Necessarily implicit in the above question is a question that could not have been presented to the Court in appellant's Jurisdictional Statement, filed in July 1985:

In the light of Pennsylvania's enactment of an eighteen-year statute of limitation for paternity actions on October 30, 1985, whether the adoption of an eighteen-year statute of limitation for paternity actions which applies to appellant's action for support before this Court, as to all Pennsylvania paternity actions, requires reversal of the judgment without the necessity for this Court to decide the constitutional questions presented?

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No. 85-88

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

BARBARA ANN PAULUSSEN,

Appellant,

v.

GEORGE RONALD HERION,

Appellee.

BRIEF AMICI CURIAE ON BEHALF OF THE CHILDREN'S DEFENSE FUND AND THE WOMEN'S LEGAL DEFENSE FUND

INTEREST OF AMICI CURIAE

The interest of amici is detailed in the motion accompanying this brief.

STATUTES INVOLVED

In addition to the statutory and constitutional provisions quoted in appellant's brief, this case involves the Child Support Enforcement Amendments of 1984, § 466(a)(5), which provides as follows:

> (a) In order to satisfy Section 454(20)(A), each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:
>
> ....
>
> (5) Procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday.

In compliance with this federal statute, on October 30, 1985, Pennsylvania adopted Act 66, § 1, subsection 4343(b),fixing a new eighteen-year statute of limitation in paternity actions:

> (b) Limitation of actions. -- An action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of birth of the child.

SUMMARY OF ARGUMENT

I.

The Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat.

1305 (1984) (Amendments) require States participating in the program for Aid to Families with Dependent Children (AFDC), Title IV, Part A of the Social Security Act, 42 U.S.C. §§ 601-615 (1982), to adopt certain procedures to assure the effectiveness of the child support enforcement program for all children, AFDC recipients and non-recipients alike. Title IV, Part D of the Social Security Act, 42 U.S.C. §§ 651-665 (1982). One of these requirements is the adoption of procedures "which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday." Amendments § 466(a)(5). That Congress intended state statutes of limitation adopted pursuant to the federal act to apply to the paternity cause of action of any child who has not reached his eighteenth birthday, even if a shorter statute of limitation previously

foreclosed suit, is clear from the plain language of the Amendments, their legislative history and the interpretation of the U.S. Department of Health and Human Services (HHS), which is responsible for administering the federal aspects of the child support enforcement program.

Pursuant to the Amendments, on October 30, 1985, the Pennsylvania legislature amended its statute of limitation for paternity actions to allow such actions to be brought before a child's eighteenth birthday. Act 66 § 1 (October 30, 1985) (to be codified at 43 Pa. Cons. Stat. Ann. § 4343(b)) (Act 66). Act 66 will be effective on December 31, 1985. See Act 66 § 4. Although the extended statute of limitation does not specify its applicability or inapplicability to cases previously foreclosed by the six-year statute of limitation, the federal amendments to the child support

enforcement program require that it be construed as applicable. Moreover, under Pennsylvania case law the new eighteen-year limitation period will be applied in all cases.

As a result of Pennsylvania's newly revised statute of limitation, appellant's suit to establish the paternity of her child is timely.[1/] Thus, this case should be decided by application of the Child Support Enforcement Amendments of 1984 and the recently revised Pennsylvania statute of limitation, thereby avoiding the need to decide a constitutional question. E.g., Crowell v. Benson, 285 U.S. 22, 62 (1932).

II.

Pennsylvania's six-year paternity statute of limitation (42 Pa. Cons. Stat.

1/ See footnote 14, p. 29.

Ann. § 6704(b) (Purdon Supp. 1985)) is unconstitutional because it is not sustained by a strong state interest as required by this Court in Pickett v. Brown, 462 U.S. 1 (1983) and Mills v. Habluetzel, 456 U.S. 91 (1982). The alleged state interest in preventing the litigation of stale or fraudulent claims, on which Section 6704(b)is purportedly based, is seriously undermined by Pennsylvania's depreciation of that alleged interest in the context of other civil actions closely analogous to the action in this case.

For example, the fact that Pennsylvania tolls most actions during a child's minority (42 Pa. Cons. Stat. Ann. § 5533(b) (Purdon Supp. 1985)) casts serious doubt as to whether the burden placed on children born out of wedlock is designed to advance a permissible state interest.

See Pickett v. Brown, supra, 462 U.S. at 15-16. Similarly, there is no apparent statute of limitation when the issue of paternity is litigated in the context of inheritance proceedings (20 Pa. Cons. Stat. Ann. § 2107(c) (Purdon Supp. 1985)).

The relationship between Pennsylvania's statute of limitation and its alleged interest in preventing the litigation of stale or fraudulent paternity claims is further attenuated in light of recent scientific advances in blood and serologic testing that have alleviated the problems of proof surrounding such claims. Pickett v. Brown, supra, 462 U.S. at 17.

Moreover, the six-year period for filing paternity actions does not provide a reasonable or adequate opportunity to obtain such support. Many of the circumstances inhibiting the filing of a

paternity suit within two years after the child's birth may still remain six years after the child's birth. Pickett v. Brown, supra, 462 U.S. at 12-13; see also Mills v. Habluetzel, supra, 456 U.S. at 100, 105 & n.4 (O'Connor, J., concurring). Some of the inhibiting factors are particularly prevalent at the time a child enters school, approximately at age six.

Finally, the alleged state interest in preventing the litigation of stale or fraudulent claims is offset by a countervailing state interest in insuring that genuine claims for child support are satisfied and in preventing increases in its welfare rolls. Pickett v. Brown, supra, 462 U.S. at 12; Mills v. Habluetzel, supra, 456 U.S. at 103-04 (O'Connor, J., concurring).

Accordingly, Section 6704(b) should be declared to be unconstitutional.

ARGUMENT

I. THE FEDERAL CHILD SUPPORT ENFORCEMENT AMENDMENTS, AS IMPLEMENTED BY THE COMMONWEALTH OF PENNSYLVANIA, WHICH ALLOW PATERNITY ACTIONS TO BE BROUGHT UNTIL A CHILD'S EIGHTEENTH BIRTHDAY, REQUIRE REVERSAL OF THE LOWER COURT'S JUDGMENT

A. The Plain Terms of the Amendments Require That They Be Applied to This Case

In 1984, Congress enacted the Child Support Enforcement Amendments to enhance the ability of federal and state governments to establish and enforce child support obligations. Section 466(a)(5) of these Amendments requires states to have "procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday." In compliance with the Child Support Enforcement Amendments, Pennsylvania repealed the six-year statute of limitation for paternity actions in effect when appellant's action was filed

and enacted a provision which allows paternity actions to be brought for eighteen years. Act 66 § 3(a); id. § 1, subsection 4343(b).

There can be no question that Act 66 would allow appellant to proceed with her action against appellee if applied to this case. The only question here is whether the Act applies to actions like this one that are not yet final. The answer is clearly yes.

The terms of the federal statute which precipitated Act 66 make clear that Congress envisioned all illegitimate children of eighteen years or less would be able to establish paternity. The Child Support Enforcement Amendments require States to permit paternity actions at any time prior to a child's eighteenth birthday. Amendments § 466(a)(5). Since the language of this provision of the

Amendments is clear and unambiguous, there is no opportunity for an alternative construction. As this Court has repeatedly held:

> Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.

Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., ___ U.S. ___, 105 S.Ct. 658, 662 (1985). See also Lowe v. Securities and Exchange Commission, ___ U.S. ___, 105 S.Ct. 2557, 2574 (1985) (White, J. concurring). Thus, the Amendments require that States with shorter statutes of limitation permit the paternity claims of all children under the age of eighteen,[2/]

2/ It should be noted, however, that States may be constitutionally required to permit paternity and support actions to be brought even beyond eighteen years after the child's birth if they

(footnote cont'd)

which have not been subject to a fina. judgment on the merits, to be adjudicated. Therefore, Pennsylvania, to remain in

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provide legitimate children with a right to child support beyond age eighteen. Although a State may not be required to "adopt procedures for illegitimate children that are coterminous with those accorded legitimate children," Mills v. Habluetzel, 456 U.S. 91, 97 (1982), any restriction imposed on illegitimate children beyond requiring them to prove paternity will only survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest. Id. at 99; Pickett v. Brown, 462 U.S. 1, 8 (1983). A "State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." Pickett v. Brown, supra, 462 U.S. at 8-9 (quoting Gomez v. Perez, 409 U.S. 535, 538 (1973)). Since Pennsylvania clearly requires a parent to pay child support beyond age eighteen under certain circumstances (see Commonwealth ex rel. Stump v. Church, 333 Pa. Super. 166, 481 A.2d 1358, 1361 (1984) (support required for preparation for college); Oman v. Oman, 333 Pa. Super. 356, 482 A.2d 606, 610 (1984)); In re McCready's Trust, 387 Pa. 107, 126 A.2d 429 (1956) (requiring support for a disabled adult child) and allows a legitimate child to seek such support for the first time at age eighteen or thereafter, it is clear that its new eighteen-year statute of limitation is subject to future equal protection scrutiny in an appropriate case.

compliance with the child support enforcement program, is required to provide a forum for all paternity actions brought by, or on behalf of, a child under eighteen, which have not been finally adjudicated, including those previously barred by the six-year statute of limitation.

Act 66, Pennsylvania's new statute of limitation for paternity actions, must be applied to eliminate the statute of limitation defense to appellant's paternity action. Act 66 was enacted specifically to bring the Commonwealth into compliance with the Child Support Enforcement Amendments. Pennsylvania Legislative Journal-Senate, at 1099 (October 9, 1985) (extension of remarks of Senator Greenleaf). Therefore, while Pennsylvania's new statute of limitation is silent on the issue of the scope of its application, it must be read in light of the federal

statute it implements to allow paternity actions to be brought at any time for any child prior to the child's eighteenth birthday.[3/]

B. The Statute Of Limitation Provision of The Federal Child Support Enforcement Laws If Applied To This Case Would Eliminate Appellee's Defense

Federal legislation addressing the establishment and enforcement of child support obligations dates back to 1950. Concerned about an increase in the number of children deserted by their fathers, Congress amended Title IV of the Social

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3/ The new statute of limitation is applicable to this case because the litigation is still pending on direct review. See generally Linkletter v. Walker, 381 U.S. 618, 627 (1965); Chase Securities Corporation v. Donaldson, 325 U.S. 304 (1945). Moreover, as we will show, Congress intended that the new statute of limitation also applies to all cases involving claims by children under the age of eighteen. See pp. 25-29 infra.

Security Act[4/] to require state welfare agencies to notify law enforcement officials whenever Aid to Families with Dependent Children (AFDC) was furnished to a child who had been deserted.[5/] The Social Security Act of 1950 was supplemented over the next two decades by provisions that enhanced the ability of a welfare agency to locate absent parents.[6/]

The early federal legislation focused on locating parents whose legal obligation to support their children was already clear. These efforts did not

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4/ Title IV-A of the Social Security Act (AFDC), 42 U.S.C. §§ 601-615 (1982), provides for partial federal reimbursement to states providing financial assistance to dependent needy children and their caretakers.

5/ Social Security Act of 1950, § 402(a)(10), 42 U.S.C. § 602(a)(11) (1982).

6/ See Social Security Amendments of 1965, Pub.L. No. 89-97, 79 Stat. 286 (1965); Social Security Amendments of 1967, Pub.L. No. 90-248, 81 Stat. 821 (1968).

facilitate the collection of child support for unacknowledged illegitimate children. For these children, the establishment of parentage is an essential prerequisite to obtaining and enforcing parental child support.

In 1967, Congress began to legislate mechanisms to facilitate the establishment of paternity.[7/] The Social Security Amendments of 1967, supra, provided that, as a part of its AFDC program, each participating State was required to establish a single organizational unit with responsibility for establishing paternity of children receiving public assistance. 42 U.S.C. § 654(3) (1982).

Child support enforcement by the States and the Department of Health, Education and Welfare (HEW) (now HHS),

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7/ See footnote 2, p. 11.

however, remained uneven.[8/] To encourage "more aggressive administration" of the child support laws, in 1974 Congress amended the Social Security Act to add a new part, Part D, to Title IV. S. Rep. No. 1356, 93rd Cong., 2d Sess. 46 (1947). Part D, entitled "Child Support and Establishment of Paternity" (child support enforcement program), authorized federal reimbursement of seventy percent of the funds used for enforcing the support obligations owed by absent parents to their children, for locating absent parents, for obtaining child and spousal support, and for establishing paternity. 42 U.S.C. § 655(a)(1) (1982).

As initially enacted, the child support enforcement program had only

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8/ S. Rep. No. 1356, 93d Cong., 2d Sess. 51 (1974). See H.R. Rep. No. 527, 98th Cong., 1st Sess. 23 (1983).

limited success. Each year, nearly two million children are born out of wedlock or have parents who divorce. H.R. Rep. No. 527, supra, at 30. In other cases children are deserted by a parent or separation occurs without divorce. Data from the 1981 census indicated that forty percent of families entitled to child support orders did not have them. Dodson and Horowitz, Child Support Enforcement Amendments of 1984: New Tools for Enforcement, 10 Fam. L. Rep. 3051 (1984). Of the sixty percent of children for whom child support orders had been obtained, fewer than half received full payments and more than a quarter received nothing at all. H.R. Rep. No. 527, supra, at 30.

In addition, the levels of success of state implementation of the initial child support enforcement program differed

markedly. 49 Fed. Reg. 36780, 36781 (1984). Many States did not enforce child support obligations as energetically for non-AFDC families as for AFDC families, and many did not adopt the enforcement mechanisms that had proven effective in other States. H.R. Rep. No. 527, supra, at 29; see 49 Fed. Reg. 36780, 36781 (1984).

In the Child Support Enforcement Amendments of 1984, Congress sought to rectify these problems. First, Congress made explicit its intention that the child support enforcement program was to be used to assure that all children, regardless of their eligibility for AFDC, could receive assistance in securing financial support from their parents. H.R. Rep. No. 527, supra, at 29-30.

Second, Congress identified certain procedures used by States with the most

effective child support enforcement programs and mandated the adoption of these procedures by each State. If a State failed to have each mandated procedure, it was subject to losing federal child support enforcement funds and a significant portion of federal AFDC funds. 42 U.S.C. §§ 603(h), 655(a).[9/] These mechanisms included procedures for wage withholding, for deductions from state income tax refunds, and for expedited processing to establish support obligations. Amendments § 466(a).

Most significantly, Congress required that the States have by October 1, 1985, procedures which permit "the establishment of the paternity of any child at any time

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9/ See 49 Fed. Reg. 36780, 36781 (1984). See generally King v. Smith, 392 U.S. 309 (1968) (federal government is free to establish conditions for participation in federally funded programs).

prior to such child's eighteenth birthday." Amendments § 466(a)(5) (emphasis added). See Amendments § 466(g)(1).10/

The minimum limitation period for paternity actions of eighteen years prescribed by Section 466(a)(5) of the Child Support Enforcement Amendments has the effect of reviving unadjudicated causes of action barred by shorter state statutes of limitation and of eliminating statute of limitation defenses to pending claims filed before the child's eighteenth birthday.11/ That Congress intended

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10/ When state legislative calendars did not permit compliance by October 1, 1985, States were given until the beginning of the fourth month beginning after the end of the first session of the State legislature which ended on or after October 1, 1985 to adopt the provisions. Amendments § 466(g)(3).

11/ But cf. footnote 2, p. 10 (questioning the constitutionality of any state statute of limitation for a period shorter than that allowed for actions for support brought by legitimate children).

Section 466(a)(5) to have such effect is clear from the legislative history. The House of Representatives, in approving the Amendments, specifically stated:

> The bill provides that procedures under applicable State paternity laws must permit the establishment of an individual's paternity for any child at least until the child's eighteenth birthday. . . . States could eliminate statutes of limitation for establishing paternity altogether if they wished.

H.R. Rep. No. 527, supra, at 38.

HHS's implementing regulations, 45 C.F.R. § 302.70(a)(5), parallel the statute and make clear that appellee no longer has a statute of limitation defense. The preamble to the final regulations state that "it is clear that cases previously considered to be closed because of the child's age will now have to be reopened and services provided." 50 Fed. Reg. 19608, 19631 (1985) (to be

codified at 45 C.F.R. § 302.70(a)(5)). In other words, as a matter of federal law, Pennsylvania must allow Georgeanne Paulussen's case to proceed with no applicable statute of limitation defense. Moreover, although this case is focused narrowly, Pennsylvania must allow proceedings on behalf of all children under the age of eighteen.

HHS' position on this issue is, of course, entitled to substantial deference. See, e.g., Connecticut Department of Income Maintenance v. Heckler, ____ U.S. ____, 105 S. Ct. 2210, 2214 (1985).[12/] Moreover, HHS' position is the only reasonable interpretation of the plain language of the Act and legislative

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12/ See, e.g., 42 U.S.C. § 652(a)(1) regarding the Secretary's authority to establish standards for state child support enforcement programs to assure that they will be effective.

history, both of which refer to permitting the establishment of paternity of "any child" at any time prior to age eighteen. Any other interpretation would wholly undercut Congress' entire purpose in the 1984 Amendments "that all children in the United States who are in need of assistance in securing financial support from their parents will receive such assistance regardless of their circumstances...."

H.R. Rep. No. 925, 98th Cong., 2d Sess. 29 (1984) (emphasis added.)[13/]

13/ For example, if children over age six when the Amendments were enacted could not now sue, that part of the federal child support program which allows all illegitimate children under age eighteen to obtain child support would not be wholly effective in Pennsylvania until the year 1996, and the federal program would in effect be phased in over twelve years. Such a result was beyond Congress' contemplation and would wholly frustrate the 1984 Amendments. Moreover, such a reading would create anomalies that Congress could not have intended and that would themselves raise serious equal protection concerns. As just

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C. Pennsylvania Implemented the Child Support Enforcement Amendments By Enacting a New Eighteen-Year Statute of Limitation Which Applies to Eliminate Appellee's Defense

At the time of passage of the Child-Support Enforcement Amendments, the Commonwealth of Pennsylvania required that:

> actions or proceedings to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall have acknowledged in writing his paternity, in which case an action or

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(footnote cont'd)

one example, the child who was five in 1984 could first sue at age ten in 1990 (or age seventeen in 1997), but the child who was six in 1984 could never sue, not even at age seven in 1985, or age eight in 1986, a wholly irrational result. Moreover, not allowing cases "previously considered to be closed [now] to be reopened" would create additional anomalies of children being allowed to sue or barred from suing based on the vicissitudes of their States' effective dates for implementing the 1984 federal amendments, which can vary by up to two years. See Amendments § 466(g)(3).

> proceeding may be commenced at any time within two years of any such contribution or acknowledgment by the reputed father.

42 Pa. Cons. Stat. Ann. § 6704(b) (Purdon Supp. 1985) (previously found at 42 Pa. Cons. Stat. Ann. § 6704(e) (Purdon 1982)). This provision conflicted with the eighteen-year statute of limitation required by the Child Support Enforcement Amendments.

On October 30, 1985, the Pennsylvania Legislature enacted Act 66. The new statute provides that "[a]n action or proceeding under this chapter to establish the paternity of a child born out of wedlock must be commenced within 18 years of the date of birth of the child," and repealed the six-year statute of limitation. Act 66 § 1, subsection 4343(b); id § 3(a). Pennsylvania's revised statute of limitation becomes effective on

December 31, 1985. Id. § 4. After that date, there is no statute of limitation bar to the paternity and child support claims of illegitimate minors in Pennsylvania.

As a matter of Pennsylvania law, Act 66 will be applied to eliminate appellee's statute of limitation defense. As Act 66 serves only to extend the statute of limitation of paternity actions, it is procedural and not substantive. See Crisante v. J.H. Beers, Inc., 297 Pa. Super. 337, 443 A.2d 1150 (1982). Both this Court and the Pennsylvania Supreme Court have held that legislation affecting procedure may be applied "retroactively" to litigation pending prior to its enactment. Chase Securities Corporation v. Donaldson, supra, 325 U.S. at 311-12; Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556, 559

n.5 (1975); Smith v. Fenner, 399 Pa. 633, 161 A.2d 150 (1960). See also Universal Cyclops Steel Corporation v. Workmen's Compensation Appeal Board, 9 Pa. Commw. 176, 305 A.2d 757, 761 (1973).

Indeed, in reviewing the propriety of a retroactively applied statute of limitation, the Pennsylvania Supreme Court has held "[t]here is no constitutional objection to [the] retroactive application of such a statute." Crisante, supra, 443 A.2d at 1153. See also Chase Securities Corporation, supra, 325 U.S. at 311. Moreover, when the Pennsylvania courts have considered the retroactivity of earlier statutes of limitation in paternity actions, they have held that the statute in effect at the time of decision, and not the statute in effect at the time of the child's birth when the cause of action arose, applies. See

Hatfield v. Hazelbaker, 306 Pa. Super. 555, 452 A.2d 863 (1982); Jennis v. Stillman, 306 Pa. Super. 431, 452 A.2d 801 (1982). Georgeanne Paulussen, appellant's child, is only thirteen years old. Appellee's statute of limitation defense is, therefore, no longer valid.

* * *

The Child Support Enforcement Amendments of 1984 as implemented by the Commonwealth of Pennsylvania eliminates appellee's statute of limitation defense. They thereby provide a statutory basis for a final resolution of this matter, thus avoiding the need to decide a constitutional question. Crowell v. Benson, supra, 285 U.S. at 62.14/ Nonetheless we now turn to a demonstra-

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14/ Amici recognize that the Court could vacate and remand this case to the lower court for a

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tion that Pennsylvania's prior six-year statute of limitation violates the Equal Protection Clause.

II. PENNSYLVANIA'S SIX-YEAR PATERNITY STATUTE OF LIMITATION IS UNCONSTITUTIONAL SINCE IT IS NOT SUBSTANTIALLY RELATED TO A LEGITIMATE STATE INTEREST AND IT DOES NOT PROVIDE AN ADEQUATE OPPORTUNITY TO OBTAIN SUPPORT

As this Court has held, restrictions on support actions by children born out

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determination as to the effect of the new federal and state statute of limitation laws. However, such a remand is inappropriate and unnecessary since the law is clear, the issue is overwhelmingly one of federal law, and a remand would impose a significant burden on the appellant, as well as leave the question unsettled for the many States that will be implementing the Child Support Enforcement Amendments in the near future. In any event, such a remand would be wholly inappropriate particularly because, as amici demonstrate in Part II below, Pennsylvania's existing six-year statute is unconstitutional. Thus, amici urge the Court to make a final determination in this case on the ground either that the new eighteen-year limitation period applies and George Ronald Herion has no statute of limitation defense, or that Pennsylvania's prior six-year limitation period is unconstitutional.

of wedlock "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." Mills v. Habluetzel, supra, 456 U.S. at 99. Moreover, the period for obtaining support has to be long enough to provide an adequate opportunity to seek needed support. Id.; Pickett v. Brown, supra, 462 U.S. at 9. As set forth below, Pennsylvania's six-year statute fails to meet these two related requirements and must be struck down as violative of the Equal Protection Clause.

A. Pennsylvania's Alleged Interest In Preventing The Litigation Of Stale Or Fraudulent Claims Through Its Six-Year Paternity Statute Of Limitation Is Undermined By Its Depreciation Of That Interest In Other Statutes

As evidenced in Pennsylvania's other statutes, the Commonwealth has given short shrift to its asserted interest in preventing the litigation of stale or

fraudulent claims. In several closely related circumstances, it has determined instead that the prospective plaintiff's interest in bringing an action should prevail. This demonstrates that the Commonwealth does not have an interest in preventing the litigation of stale claims that is strong enough to justify its disparate treatment of legitimate and illegitimate children in the context of paternity and support actions, such as that commenced by Georgeanne Paulussen.

The Pennsylvania courts have held that Section 6704(b), supra, is substantially related to a legitimate state interest in preventing the litigation of stale or fraudulent paternity claims. Astemborski v. Susmarski, 502 Pa. 409, 466 A.2d 1018, 1022 (1983). Accord Paulussen v. Herion, 334 Pa. Super. 585, 483 A.2d 892, 894 (1984). In so holding,

those courts failed to consider that this alleged interest is seriously undercut by Pennsylvania's degradation of such interest with regard to other claims.

For example, Pennsylvania has recently enacted a provision generally tolling the statutes of limitation for actions which a child is entitled to bring at any time during the time of that child's minority. 42 Pa. Cons. Stat. Ann. § 5533(b)(Purdon Supp. 1985).[15/]

15/ The tolling provision in 42 Pa. Cons. Stat. Ann. § 5533(b)(Purdon Supp. 1985), adopted in May 1984, provides as follows:

> (b) Infancy. If an individual entitled to bring a civil action is an unemancipated minor at the time the cause of action accrues, the period of minority shall not be deemed a portion of the time period within which the action must be commenced. Such person shall have the same time for commencing an action after attaining majority as is allowed to others by the provisions of this subchapter. As used in this subsection the term "minor" shall mean any individual who has not yet attained the age of 18.

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This Court noted the clear contradiction between a minority tolling provision enacted by Tennessee and its paternity statute of limitation in Pickett v. Brown, pointing out that:

> [m]any civil actions are fraught with problems of proof, but [the State] has chosen to overlook these problems in most instances in favor of protecting the interests of minors. In paternity and child support actions brought on behalf of certain illegitimate children, however, the State instead has chosen to focus on the problems of proof and to impose on these suits a short limitations period.

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Prior to Pennsylvania's adoption of this tolling provision, Pennsylvania did not provide for the tolling of statutes of limitation during minority except in very limited circumstances. Indeed, the Pennsylvania Supreme Court previously relied on the absence of such a tolling provision in upholding its six-year statute of limitation for paternity actions as constitutional, concluding that "in Pennsylvania, paternity actions are treated no differently from the vast majority of actions brought on behalf of a child." Astemborski v. Susmarski, supra, 466 A.2d at 1021 n.3. However, the recently enacted tolling provision in Section 5533(b) now undermines that conclusion.

Pickett v. Brown, supra, 462 U.S. at 16.

Similarly, here, Pennsylvania has determined that the problems of proof in most civil actions do not outweigh the protection of the interests of children, but it has inexplicably reached a different conclusion regarding the tolling provision applicable to paternity actions.16/ Accordingly, Pennsylvania's tolling provision is a factor that "may lead one

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16/ As in Pickett, there is apparently some uncertainty about the relationship between the six-year statute of limitation for paternity actions and the tolling provision. See Pickett v. Brown, supra, 462 U.S. at 16 n.15. Amici have found no reported adjudication by the Pennsylvania courts of the applicability of this tolling provision to the challenged six-year statute of limitation. However, this tolling provision was in effect at the time of the lower court's decision in Paulussen v. Herion, supra, 483 A.2d 892. Nonetheless, that court failed even to consider it, either as tolling the statute of limitation or as relevant to the Equal Protection challenge, in contravention of this Court's direction in Pickett that such a provision is a factor undercutting the alleged state interest in preventing the litigation of stale or fraudulent claims. See Pickett v. Brown, supra, 462 U.S. at 16.

'to question whether the burden placed on illegitimates is designed to advance permissible state interests,'" Pickett v. Brown, supra, 462 U.S. at 16 (quoting Mills v. Habluetzel, supra, 456 U.S. at 105 (O'Connor, J., concurring)), or is instead an impermissible vestige of prejudicial treatment of children born out of wedlock.[17/]

17/ It should be noted that some state courts have chosen to apply such tolling provisions to paternity statutes of limitation in an attempt to avoid declaring such statutes of limitation unconstitutional. See, e.g., Sutherland v. Hurin, 185 Mont. 544, 605 P.2d 1133 (1980); Ruddock v. Ohls, 91 Cal. App. 3d 271, 154 Cal. Rptr. 87 (1979). See also Nettles v. Beckley, 32 Wash. App. 606, 648 P.2d 508 (1982). Cf. State v. Christensen, 19 Ariz. App. 479, 508 P.2d 366, 368 (1973) (holding that the determination of paternity may not be extinguished by a statute of limitation while the duty to support continues); State v. Bailey, 253 S.C. 304, 170 S.E.2d 376, 378 (1969) (holding that nonsupport of a child born out of wedlock is a continuing offense with a continually accruing cause of action which a paternity statute of limitation cannot extinguish). However, the direct approach of expressly declaring

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It is also noteworthy that Pennsylvania's six-year limitation period does not explicitly apply to paternity determinations made under Pennsylvania's Revised Uniform Reciprocal Enforcement of Support Act (RURESA).[18/] Pennsylvania's RURESA provides that when it is necessary to determine paternity in the course of finding a duty to support under RURESA, the hearing on paternity may be held

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(footnote cont'd)

paternity statutes of limitation unconstitutional, as did this Court in Mills, has been followed by a number of courts convinced that such statutes deny equal protection to children born out of wedlock. See, e.g., Callison v. Callison, 687 P.2d 106 (Okla. 1984); Commonwealth ex rel. Lepard v. Young, 666 S.W.2d 735 (Ky. 1983); District of Columbia ex rel. W.J.D. v. E.M., 467 A.2d 457 (D.C. App. 1983); County of Lenoir ex rel. Cogdell v. Johnson, 46 N.C. App. 182, 264 S.E.2d 816, 821 (1980); State Department of Health and Rehabilitative Services on behalf of Gillespie v. West, 378 So.2d 1220, 1228 (Fla. 1979).

18/ Pennsylvania adopted RURESA, effective 1978. See 42 Pa. Cons. Stat. Ann. §§ 6741-80 (Purdon 1982).

under 42 Pa. Cons. Stat. Ann. § 6767 (Purdon 1982).[19/]

Pennsylvania's choice of law provision under RURESA provides that its law governs the determination of the father's duty of support. 42 Pa. Cons. Stat. Ann. § 6747 (Purdon 1982).[20/] Accordingly,

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19/ Numerous courts have found it appropriate to consider paternity in the context of RURESA or Uniform Reciprocal Enforcement of Support Act (URESA) proceedings without requiring the initiation of a separate paternity action under local paternity statutes. See Greenstreet v. Clark, 239 N.W.2d 143, 146-47 (Iowa 1976); M. __ v. W. __, 352 Mass. 704, 227 N.E.2d 469, 474 (1967); Pfueller v. Pfueller, 37 N.J. Super. 106, 117 A.2d 30, 31 (1955); Brondum v. Cox, 292 N.C. 192, 202, 232 S.E.2d 687 (1977); Clarkston v. Bridge, 273 Or. 68, 539 P.2d 1094, 1097 (1975); Sardonis v. Sardonis, 106 R.I. 469, 261 A.2d 22, 23-24 (1970); Yetter v. Commeau, 84 Wash.2d 155, 524 P.2d 901, 903 (1974). See also Fox, The Uniform Reciprocal Enforcement of Support Act, 4 Fam. L. Rep. 4017, 4021 (1978).

20/ Section 6747 of Pennsylvania's RURESA provides:

> Duties of support applicable under this subchapter are those imposed under the laws

(footnote cont'd)

Pennsylvania law must be reviewed for the applicable statute of limitation.

However, no limitation period is explicitly applicable to petitions under RURESA. The limitation established for paternity actions under Section 6704(b), the statute of limitation here at issue, applies only to actions brought under that "section," and not to paternity determinations made under the separate Section 6767 of the Pennsylvania RURESA.[21/]

(footnote cont'd)

> of any state where the obligor was present for the period during which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown.

See Chrzanowski v. Chrzanowski, 325 Pa. Super. 298, 472 A.2d 1128, 1130-31 (1984).

21/ It should also be noted that the Rules of Civil Procedure (42 Pa. R.C.P. 1910.1-.31 (Purdon 1983)) governing actions for support explicitly do not govern such actions under RURESA. 42 Pa. R.C.P. 1910.1(b)(1)(a) (Purdon 1983).

This interpretation of Pennsylvania's RURESA is supported by the District of Columbia Court of Appeals' decision in Harris v. Kinard, 443 A.2d 25 (1982), where that Court held that the District's two-year statute of limitation for paternity and support actions[22/] was inapplicable to hearings on paternity under the District of Columbia's URESA. Id. at 29. Although a county trial court has held that Pennsylvania's six-year limitation period is applicable to RURESA petitions without any analysis or interpretation of the plain language of Section 6704(b),[23/]

22/ The District of Columbia's two-year statute of limitation was later struck down as unconstitutional in District of Columbia ex rel. W.J.D. v. E.M., supra, 467 A.2d at 467. See also Trent v. Loru, 57 Misc.2d 382, 292 N.Y.S.2d 524 (1968) (where the court rejected the putative father's argument that the New York statute of limitation for local paternity actions applies to RURESA proceedings).

23/ Esters v. Phillips, 23 D. & C. 3d 122 (Fam. Div., Ct. of Common Pleas, Beaver Cty. 1982).

it is clear that a careful reading of that section establishes its inapplicability to RURESA petitions.

Thus, under this statute, had Georgeanne and her mother left Pennsylvania and filed a RURESA petition in another jurisdiction against George Herion, it seems quite possible that she would not have been barred under Pennsylvania's six-year statute of limitation. There is clearly no justifiable reason why Pennsylvania's alleged interest, if any, in preventing stale or fraudulent claims against putative fathers residing in Pennsylvania is more compelling when the claim is brought by a child residing within Pennsylvania than when a claim is brought by a child living in another state.24/

24/ Indeed, one would assume that the countervailing state interest in insuring that the

(footnote cont'd)

Pennsylvania also allows the issue of paternity to be litigated by offspring at any age in the context of inheritance proceedings. 20 Pa. Cons. Stat. Ann. § 2107(c)(3) (Purdon Supp. 1985).25/ Clearly, under Pennsylvania's statutory scheme, the alleged state interest in

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(footnote cont'd)

genuine claims for child support of its residents are satisfied would dictate that any differentiation between nonresident and resident children born out of wedlock would be made in favor of the latter. See Mills v. Habluetzel, supra, 456 U.S. at 103-04 (O'Connor, J., concurring).

25/ The pertinent portion of 20 Pa. Cons. Stat. Ann. § 2107(c)(3) (Purdon Supp. 1985) provides as follows:

> (c) Child of father. For purposes of descent by, from and through a person born out of wedlock, he shall be considered the child of his father when the identity of the father has been determined in any one of the following ways:
>
> . . . .
>
> (3) If there is clear and convincing evidence that the man was the father of the child, which may include a prior court determination of paternity.

preventing stale and fraudulent claims is not strong enough to bar presentation of evidence of paternity in inheritance proceedings after the lips of the alleged father have been sealed by death. Yet, in claims for support brought by children born out of wedlock under Section 6704, even with the putative fathers alive to contradict the allegations of paternity, Pennsylvania inexplicably elevates such state interest to the point of barring any evidentiary hearing or trial on the issue of paternity.[26/]

26/ Rather than arbitrarily and completely barring attempts to establish paternity after an artificially short time period, Pennsylvania has chosen in the context of inheritance proceedings merely to raise the level of the burden of proof, a more appropriate mechanism than an absolute bar, albeit not one that amici believes appropriate in paternity proceedings. Compare 20 Pa. Cons. Stat. Ann. § 2107(c)(3) (Purdon Supp. 1985) (requiring proof of paternity in inheritance proceedings by clear and convincing evidence)

(footnote cont'd)

In sum, the alleged state interest in preventing stale or fraudulent claims in paternity actions is wholly undermined by Pennsylvania's minimization of that interest with regard to other actions, as set forth above. Accordingly, Section 6704(b) may not be justified under this

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(footnote cont'd)

with 42 Pa. Cons. Stat. Ann. § 6704(d) (Purdon Supp. 1985) (providing that the burden of proof in a paternity action under that section "shall be by a preponderance of the evidence"). See also the Uniform Parentage Act (UPA), 9A U.L.A. (1973), using different evidentiary burdens in different circumstances. As explained in District of Columbia ex rel. W.J.D. v. E.M., supra, 467 A.2d at 467 n.19:

> The UPA, which generally permits a child to initiate paternity proceedings until 3 years after reaching majority, establishes several rebuttable presumptions that vary the degree of difficulty that defending a paternity action will entail depending upon the circumstances of each case. The UPA represents an effort to find a satisfactory means of balancing the state's interest in seeing that children born out of wedlock have a real opportunity to establish paternity and obtain parental support, while at the same time affording putative fathers a measure of protection from stale or fraudulent claims.

alleged state interest and should be struck down as violative of the Equal Protection Clause.

B. Technological Advances In Blood And Serologic Testing Further Undercut The Alleged State Interest In Preventing The Litigation Of Stale Or Fraudulent Claims

As this Court's unanimous opinion in Pickett pointed out:

> the relationship between a statute of limitations and the State's interest in preventing the litigation of stale or fraudulent paternity claims has become more attenuated as scientific advances in blood testing have alleviated the problems of proof surrounding paternity actions. As JUSTICE O'CONNOR pointed out in Mills, these advances have "dramatically reduc[ed] the possibility that a defendant will be falsely accused of being the illegitimate child's father." Id., at 104, n.2 (concurring opinion).

Pickett v. Brown, supra, 462 U.S. at 17. This is a key consideration in determining whether Section 6704(b) is substantially related to a legitimate

state interest, and a consideration to which the Pennsylvania courts gave very short shrift. Id. at 17-18.

The lower court here erred in failing to consider whether its six-year limitation period was "sufficiently long to present a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims." Mills v. Habluetzel, supra, 456 U.S. at 99.[27/] The measurement of the extent of such "real threat," if any, requires a thorough scrutiny of how evidence of paternity is created and refuted.

27/ See State, ex rel. Adult and Family Services Division v. Bradley, 58 Or. App. 663, 650 P.2d 91, 96 (1982), aff'd, 295 Or. 216, 666 P.2d 249 (1983) (quoting Mills, supra, with emphasis) (initiation of paternity action six years after birth does not present "real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims"); Commonwealth v. Gruttner, 385 Mass. 474, 432 N.E.2d 518 (1982) (six-year statute of limitation violates equal protection).

However, the lower court in this case ignored the actual nature of the evidence in paternity proceedings, and instead relied on the Pennsylvania Supreme Court's decision in Astemborski v. Susmarski. See Paulussen v. Herion, supra, 483 A.2d at 894 (citing Astemborski v. Susmarski, supra, 466 A.2d 1018). The Astemborski decision, in turn, paid scant attention to scientific tests and focused its analysis wholly on cases "where test results do not exclude," thereby ignoring HLA tests completely. Astemborski v. Susmarski, supra, 466 A.2d at 1021. That court minimized the "scientific advances in testing" that Pickett specifically directed to be considered as a factor in weighing a State's assertion of an interest in preventing the litigation of stale or fraudulent claims.

In other types of cases, statutes of limitation may serve to protect against stale claims, the faded memories of witnesses, loss of evidence, and death or disappearance of witnesses.[28] Chase Securities Corp. v. Donaldson, supra, 325 U.S. at 314. Yet few, if any, other types of cases contain as a key evidentiary element a simple scientific test, of very high probative value, that does not deteriorate over time. Paternity cases do involve such an element -- blood tests and, increasingly, other types of scientific tests, such as serologic or

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28/ The death and disappearance of witnesses would be rare in a paternity case with respect to the two crucial witnesses, the mother and putative father. The presence of the putative father contributes substantially to the reliability of the fact-finding process and serves at the outset to discourage false claims. Lalli v. Lalli, 439 U.S. 259, 271-72 (1978). Ironically, it was only after the father's death that Pennsylvania allowed paternity claims beyond the six-year limit. See pp. 43-45 supra.

tissue typing tests, including the human leukocyte antigen (HLA) tests.[29/] Unlike older blood testing procedures which

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29/ Such tests performed by qualified experts, "[u]nlike other evidence . . ., are difficult to refute." Little v. Streater, 452 U.S. 1, 14 (1981). Despite popular misconceptions, they are extremely reliable. S. Rep. No. 1356, supra. See also Castillo, New Use of Blood Test is Decisive in Paternity Suits, N.Y. Times, June 2, 1981, at A1, col. 1 ("H.L.A. testing can now yield 'negative' evidence ruling out 99.9 percent of falsely accused men" and "also yield[ ] strong 'positive' evidence . . . of 'plausibility of paternity,'" usually greater than 95 percent); Terasaki, Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing, 16 J. Fam. L. 543 (1977-78) (blood and genetic tests exclude up to 90 percent of possible non-fathers); Stroud, Paternity Testing: A Current Approach, Trial 46 (September 1980) (routine exclusion rate of 95 to 98 percent); Keiter, Advances in Anthropological Paternity Testing, 21 Am. J. Phys. Anthropology 81 (1963) (99.73 - plus probability in 19 out of 20 cases); Taub, Medical and Legal Developments in Paternity Testing, Law Medicine and Health Care 8 (October, 1981) (HLA testing casts serious doubt on need for any statute of limitation); Haines v. Shanholtz, 57 Md. App. 92, 468 A.2d 1365, cert. denied, 300 Md. 90, 475 A.2d 1201 (1984) (HLA testing of both red and white cell antigens produces a 97.3 percent probability); Reisner & Bolk, A Layman's Guide to the Use of Blood Group Analysis in Paternity Testing, 20 J. Fam. L. 657, 673-75 (1982).

demonstrated nonpaternity, HLA testing not only achieves a higher probability of exclusion but also affirmatively indicates the probability that a particular member of the relatively small group of nonexcluded males did father a given child.30/

Indeed, as the Pennsylvania Superior Court has elsewhere recognized, "HLA testing is generally accepted as reliable" and "can be used to calculate the probability that a putative father is the actual father." Turek v. Hardy, 312 Pa. Super. 158, 458 A.2d 562, 563-65 (1983) (citing Terasaki, 16 J. Fam. L. 543,

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30/ See note 25, supra. See also Sussman & Gilja, Blood Grouping Tests for Paternity and Nonpaternity, 1981-1 N.J. St. J. Med. 343 (1981) (HLA tests with other blood grouping and blood antigen tests can lead to a statistical probability of paternity approaching 100 percent).

supra).31/ The testing procedure "provides an enhanced ability to identify the father of a child." Id. at 564.

Moreover, the Turek court found that public policy considerations, such as "protecting children from the stigma of illegitimacy, preservation of the family, and insuring that individuals rather than the government bear responsibility for child support," supported its holding

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31/ Other states, like Pennsylvania, have recognized the reliability of HLA testing and have admitted the results of such tests as affirmative proof of paternity. See, e.g., Callison v. Callison, supra, 687 P.2d 106 (Oklahoma); Willerick v. Hanshalli, 136 Mich. App. 484, 356 N.W.2d 36 (1984) (Michigan); Haines v. Shanholtz, supra, 468 A.2d 1365 (Maryland); Department of Social Services on behalf of Sandra C. v. Thomas J.S., 100 A.D.2d 119, 474 N.Y.S.2d 322 (1984) (New York); Crain v. Crain, 104 Idaho 666, 662 P.2d 538 (1983) (Idaho); Cutchember v. Payne, 466 A.2d 1240 (D.C. App. 1983) (District of Columbia); Hennepin Cty. Welfare Board v. Ayers, 304 N.W.2d 879 (Minn. 1981) (Minnesota); Carlyon v. Weeks, 387 So. 2d 465 (Fla. Dis. Ct. App. 1980) (Florida); Cramer v. Morrison, 88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979) (California).

that the results of HLA blood tests are admissible as affirmative proof of paternity. Id. at 565 (citing Cramer v. Morrison, 88 Cal. App. 3d 873, 885, 153 Cal. Rptr. 865, 872 (1979)).

Accordingly, paternity proceedings are "unique." Little v. Streater, supra, 452 U.S. at 6. The key evidence does not become stale or less probative over time. As five Justices of this Court agreed in Mills:

> The State's concern about stale and fraudulent claims is substantially alleviated by recent scientific developments in blood testing dramatically reducing the possibility that a defendant will be falsely accused of being the illegitimate child's father.

Mills v. Habluetzel, supra, 456 U.S. at 104 n.2 (O'Connor, J., concurring).[32/]

32/ See also State, ex rel. Adult and Family Services Division v. Bradley, supra, 650 P.2d at

(footnote cont'd)

Indeed, the House of Representatives, in approving the Child Support Enforcement Amendments, concluded that these advances in scientific paternity testing completely eliminated the rationale for arbitrary time limits on paternity actions:

> Relatively short statutes of limitation were enacted in the past in order to prevent stale claims and to protect a man from having to defend himself against a paternity action brought years after the child's birth when witnesses may have disappeared and memories may have become faulty. Recent progress in developing highly specific tests for genetic markers now permits the

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(footnote cont'd)

96 & n.9 ("Recent scientific developments in blood testing dramatically reduce the possibility that a defendant will be erroneously determined to be an illegitimate child's father"); In the Matter of M.D.H., 437 N.E.2d 119, 129 (Ind. Ct. App. 1982) ("recent scientific advances in blood testing and tissue analysis have simplified considerably the evidentiary problems in paternity cases"); County of Lenoir ex rel. Cogdell v. Johnson, supra, 264 S.E.2d at 821 (questioning the need for a paternity statute of limitation "in light of advances which have recently been made in blood typing").

> exclusion of over 99 percent of those wrongly accused of paternity regardless of the age of the child. These advances in scientific paternity testing eliminate the rationale for placing arbitrary time limitations on the establishment of paternity for a child and therefore the obligation to support that child.

H. R. Rep. No. 527, supra, at 38 (emphasis added).

Where, as in this case, HLA testing results show the defendant to be the father of the child to a 99.8 percent probability, such evidence is certainly sufficient to prevent any alleged concern about fraudulent claims from being elevated to the point of barring any evidentiary hearing or trial on the issue of paternity. Thus, while blood tests and similar evidence may not be dispositive, they make the central issue of fact in a paternity proceeding more susceptible to a reliable determination at a later

point in time than the central issues in other proceedings.

Nevertheless, the Pennsylvania legislature responded to the problem by making the limitation period shorter than that for many other causes of action, and the Pennsylvania Superior Court in Paulussen in turn wholly ignored the existence of blood tests, while the Pennsylvania Supreme Court in Astemborski paid only lip service to this factor. Astemborski v. Susmarski, supra, 466 A.2d at 1021. The gap between reality and Pennsylvania's responses makes it "fair to question whether the burden placed on illegitimates is designed to advance permissible state interests." Mills v. Habluetzel, supra, 456 U.S. at 105. (O'Connor, J., concurring). Rather, it is fair to conclude that Pennsylvania's design was to perpetuate the damage to

those who have suffered "through the ages society's 'illogical and unjust' condemnation." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972). Pennsylvania's statute thus does not meet the tests set forth by this Court in Mills and Pickett.

C. The Lower Court Erroneously Failed to Consider the Adequacy of A Six-Year Statute Of Limitation And the Countervailing State Interest In Ensuring That Genuine Claims For Child Support Be Satisfied

The Pennsylvania Superior Court in this case and the Pennsylvania Supreme Court in Astemborski, supra, also erred in failing to scrutinize the factual circumstances surrounding a six-year statute of limitation to determine whether it is "sufficiently long to permit either the child or the mother to assert a claim for child support" or to

determine that "the period is substantially related to the asserted interest in preventing the prosecution of stale or fraudulent claims." Mills v. Habluetzel, supra, 456 U.S. at 103 (O'Connor, J., concurring).

As this Court held in Pickett, the "obstacles to filing a paternity and child support suit within a year after the child's birth, which the Court discussed in Mills, . . . are likely to persist . . . ." Pickett v. Brown, supra, 462 U.S. at 12. The same reasoning that applied in Pickett applies here:

> The mother may experience financial difficulties caused not only by the child's birth, but also by a loss of income attributable to the need to care for the child. Moreover, "continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child," 456 U.S., at 100, may inhibit a mother from filing a paternity suit on behalf of

> the child within two years after the child's birth. JUSTICE O'CONNOR suggested in Mills that the emotional strain experienced by a mother and her desire to avoid family or community disapproval "may continue years after the child is born." Id. at 105, n.4 (concurring opinion).

Pickett v. Brown, supra, 462 U.S. at 12-13 (emphasis added) (footnote omitted); see also id. at 9-10 & n.7.

In addition to these changeable factors, other factors that a mother would or could rationally consider and that would affect her decision when to file a paternity action include: the father's financial circumstances;[33/] the danger of physical or emotional harm

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33/ Large numbers of fathers of illegitimate children are in their late teens or early twenties and in school or unemployed at the time of such children's infancy. The use of the young mother's own frequently scarce resources to retain counsel and sue a poor, young, and unemployed man might be inappropriate for the first several years, but the man's situation could change.

to the mother or child if a lawsuit is filed; an adverse change in the mother's own employment situation; a second pregnancy and childbirth, creating urgent new financial needs; the mother's own youth and ignorance of the law or confusion or deferral to a parental decision; increased costs (e.g., day care, school, or medical care) as the child grows older; the fact that the mother has not yet exhausted all other means of support; and lack of access to counsel.

The same considerations compel the conclusion that Pennsylvania's six-year limitation period does not provide children born out of wedlock with an adequate opportunity to obtain support. Indeed, the need for support may not be so acute as to compel initiation of a paternity and support action until the child reaches six years of age.

Certain needs are not likely to be manifested until the child reaches the age of six, at which time he or she begins to attend school and incurs certain expenditures for the first time. For example, the need for glasses, hearing aids, school clothes, school tuition or fees, athletic equipment, special transportation, lunch money, and many other school-related items may only arise after the child turns six. Similarly, if the mother is working outside the home, the child's need for after-school child care might cause a new financial crunch. Many government programs or day care centers help lower-income preschool children but cease aid when the child enters school.34/

34/ Such circumstances existing beyond the two-year period deemed insufficient in Pickett

(footnote cont'd)

The House of Representatives, in approving the Child Support Enforcement Amendments, explicitly criticized the inadequacy of a six-year statute of limitation:

> . . . . Some 700,000 children are born out of wedlock each year in the United States -- over 18 percent of all births. Many of these children eventually need assistance in obtaining support. . . . <u>However, if a State's applicable statute of limitation does not permit establishment of paternity past the child's second, sixth or</u>

(footnote cont'd)

have caused other courts to strike down as unconstitutional even longer periods of limitation. See, e.g., Callison v. Callison, supra, 687 P.2d 106 (Oklahoma's three-year statute violative of Equal Protection Clause); Commonwealth ex rel. Lepard v. Young, supra, 666 S.W.2d 735 (Kentucky's three-year statute held unconstitutional); State, ex rel. Adult and Family Services Division v. Bradley, supra, 650 P.2d at 96 (Oregon's six-year statute struck down); State ex rel. S.M.B. v. D.A.P., 284 S.E.2d 912 (W. Va. 1981) (West Virginia's three-year statute held to be violative of equal protection and due process rights); Commonwealth v. Gruttner, supra, 432 N.E.2d 518 (Massachusetts' six-year statute held to violative equal protection rights).

> other birthday, it will be impossible ever to establish support orders on behalf of children past these ages and therefore impossible to obtain support for them. If the custodial mother's earnings are insufficient to support the children and paternity statutes prevent the father from being obligated to support them, the children will become AFDC recipients with no possibility for the State to recover the cost of their benefits.

H. R. Rep. No. 527, supra, at 38 (emphasis added).

Finally, five Justices of this Court agreed in Mills:

> To begin with, the strength of the asserted state interest is undercut by the countervailing state interest in ensuring that genuine claims for child support are satisfied. The State's interest stems not only from a desire to see that "justice is done," but also from a desire to reduce the number of individuals forced to enter the welfare rolls. . . . Thus, while the State surely has an interest in preventing the prosecution of stale and fraudulent claims, at the same time it has a strong interest, peculiar to the State itself, in ensuring that genuine claims for child support are not denied.

Mills v. Habluetzel, supra, 456 U.S. at 103-04 (O'Connor, J., concurring) (footnotes omitted); see id. at 106 (Powell, J., concurring).

This state interest is not an insignificant one, as evidenced by the burden placed on taxpayers through the loss of revenue as a result of fathers failing to support their children born out of wedlock. The lower courts ignored this countervailing state interest in holding that Pennsylvania's six-year period for filing paternity actions was adequate.

CONCLUSION

The judgment of the Pennsylvania Superior Court should be reversed.

Respectfully submitted,

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November 27, 1985

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BRIEF

MOTION FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No. 85-88

BARBARA ANN PAULUSSEN,

Appellant,

v.

GEORGE RONALD HERION,

Appellee,

On Appeal From The
Superior Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF NEIGHBORHOOD LEGAL SERVICES ASSOCIATION
(In Support of Appellant)

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QUESTIONS PRESENTED FOR REVIEW

(1) Does the Pennsylvania statute of limitations of six years from birth in actions for child support for children born out of wedlock violate the Equal Protection Clause of the Fourteenth Amendment where no equivalent period of limitations exists for support actions filed on behalf of children born within a marriage?

(2) Does the two-year statute of limitations extension in actions for child support against fathers who acknowledge paternity violate the Equal Protection Clause of the Fourteenth Amendment where no equivalent period of limitations exists for support actions filed on behalf of legitimate children?

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MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE ON BEHALF OF
NEIGHBORHOOD LEGAL SERVICES ASSOCIATION

Pursuant to Rule 36 of the Rules of this Court, Neighborhood Legal Services Association respectfully moves this Court for leave to file the attached brief amicus curiae, in support of appellant, in the above-captioned case.

Appellant granted written consent for leave to file this brief amicus curiae, appellee did not.

Neighborhood Legal Services Association is a private, non-profit organization established in 1966 to represent and provide free civil legal services to needy, low income residents of Allegheny, Beaver, Butler and Lawrence Counties in Pennsylvania. Like the approximately twenty other legal services programs located throughout the Commonwealth of Pennsylvania[1/], Neighborhood Legal Services Association is, for the most part, publicly funded from a blend of federal and state sources, including the National Legal Services Corporation, pursuant to the Legal Services Corporation Act of 1974, 42 U.S.C. §2996 et seq. Through litigation, community education, client training and policy

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1/ Pennsylvania Legal Services Statewide Staff Roster, June 15, 1985.

analysis, Neighborhood Legal Services Association strives to

> ...make available legal services to all residents...who, because of their financial inability, are unable to procure such legal aid, and to undertake educational programs in which indigent residents may be instructed in and advised of their fundamental private rights and obligations to the end that their performance, motivation and productivity as citizens may be improved and their respect for the law increased. (From the Neighborhood Legal Services Association Application of Charter.)[2/]

Of the more than 13,000 cases handled by Neighborhood Legal Services Association during fiscal year 1983-1984, 7,115 involved problems in the area of family law, including custody disputes,

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2/ Neighborhood Legal Services Association Annual Report 1983-1984, p. 5.

domestic abuse, and support and paternity contests.[3/]

The vast majority of the client population served by Neighborhood Legal Services Association in all areas of poverty law--housing, welfare, consumer, employment and health--is composed of women--and particularly, single mothers.

Such statistics reveal the unmistakable trend, in the last decade, for women who head households in the United States to constitute an ever-increasing proportion of the overall poverty population.[4/] The poverty rate for such

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3/ Ibid, p. 7.

4/ Wood, Laurie, Mother's Day 1984 Report on the Status of Mothers in the United States, 18 Clearinghouse Review, No. 1, p. 44 (May 1984)

female-headed households is more than three times that of male-headed households and more than five times that of husband-wife families.[5/] In the last four years, the poverty rate for these families has risen, from a low of 32 percent in 1979 (compared to an overall poverty rate of 15 percent for the general population) to 36 percent.[6/] If the number of female-headed households and the proportion that they represent of the poverty population continue to increase at the present rate, in 16 years nearly 100 percent of the poverty

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5/ Ibid, citing, U.S. Commission on Civil Rights, A Growing Crisis, Disadvantaged Women and Their Children, 1, 7 (1983).

6/ Roberts, Paula, Ameloriating the Termination of Poverty: Whose Responsibility, 18 Clearinghouse Review, No. 8, 883, 884 (December 1984).

population will be women and children.[7]

Chief among this frighteningly growing group of families in poverty are ever-increasing numbers of women with children born out of wedlock. For example, statistics from the last census reveal that, in Pennsylvania alone, the percentage of out-of-wedlock births rose two percent in two years; from 15.4% of the total childbirth population in 1977 to 17.3% of the total in 1979.[8] And the percentages continue to rise in similar fashion.

Obviously, one of the available ways a single mother can alleviate the

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7/ Wood, op. cit., at 44, citing National Advisory Council on Economic Opportunity, Critical Choices for the Eighties, 14 Clearinghouse Review, 703, 708 (November 1980).

8/ Commonwealth of Pennsylvania, Department of Health, Bureau of Vital Statistics, December 31, 1980.

impoverishment of her family is to seek and collect child support from the non-custodial father. Although the statistics are bleak in this respect, as well,[9] Neighborhood Legal Services Association and similar legal services programs around the state and the country often represent women who attempt to obtain the support of their children to which the children are entitled and which is so greatly needed to live decently.

For children born out of wedlock, the first step in securing such

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9/ Forty-one percent of custodial mothers never receive child support awards; Bureau of the Census, Child Support and Alimony, Series P. 23, No. 124, 1981, Advance Report (1983). In 1981, only 35 percent of the 8.4 million women raising children with an absent father received any child support; 65% receive no help; Roberts, supra, op. cit., at 886.

desperately needed income, of course, is to establish the paternity of the non-married father.

Consequently, through the past several years, Neighborhood Legal Services Association has represented countless mothers in civil paternity actions against putative fathers, as a necessary pre-condition to the collection of support for their children.[10/] Indeed, Neighborhood Legal Services Association has been and remains involved in challenging the constitutionality of the very statute presently before this Honorable Court for its scrutiny.

10/ These clients are among the most needy economically; they are also frequently handicapped by educational limitations which may prevent effective, timely prosecution of their claims.

Neighborhood Legal Services Association intervened as an amicus on behalf of the mother for the Pennsylvania Supreme Court's consideration of Astemborski v. Susmarski, 502 Pa. 409, 466 A.2d 1018 (1983), which ruled that the six year statute of limitations did comport with the constitutional standards set by this Honorable Court in Mills v. Habluetzel, 456 U.S. 91 (1982), and Pickett v. Brown, 462 U.S. 1 (1983).

Neighborhood Legal Services Association currently represents single mothers in two other paternity cases pending before the Pennsylvania Superior Court, from which the instant action was appealed, likewise seeking a declaration that the statute of limitations is unconstitutional, Burke v. Mills, Pa. Sup. Ct. No. 1039 Pittsburgh, 1985, and

Clark v. Jeter, Pa. Sup. Ct. No. 1040 Pittsburgh, 1985.

Neighborhood Legal Services Association desires to participate as an amicus in the instant action because of its continuing interest, involvement and expertise in the representation of poor women and their children, particularly, in support and paternity proceedings. As author Paula Roberts recently wrote:[11]/

> For emotional as well as economic reasons all parties have a stake in establishing the paternity of a child--for the putative father, it is important that he feel a support obligation is legitimate. This will make it more likely that he will establish or continue a relationship with the child. For the mother, securing economic assistance, as well as emotional support, is essential. For the child, economic and emotional support,

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11/ Roberts, id., at 889.

> the possibility of being seen as part of the father's family, and access to potentially important information about family health history are critical. Each party then has a strong stake in an accurate determination.

Consequently, Neighborhood Legal Services Association respectfully asks this Honorable Court to consider the matters raised in this Brief for purposes of helping resolve the issues raised in the instant case.

Respectfully submitted:

Daniel L. Haller

Eileen D. Yacknin

Evalynn B. Welling

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No. 85-88

BARBARA ANN PAULUSSEN,

Appellant,

v.

GEORGE RONALD HERION,

Appellee,

BRIEF AMICUS CURIAE ON BEHALF OF
NEIGHBORHOOD LEGAL SERVICES ASSOCIATION

INTEREST OF AMICUS CURIAE

The interest of amicus is detailed in the motion accompanying this brief.

SUMMARY OF ARGUMENT

The six-year statute of limitations for initiating actions for support and paternity against reputed fathers of minor children born out of wedlock under

the Pennsylvania Support Proceedings Act of 1978, 42 Pa. C.S. §6704(b) (as amended), violates the Fifth and Fourteenth Amendments to the United States Constitution.

By depriving an out-of-wedlock child of the right to seek support from the child's reputed father more than six years after the child's birth, while not similarly proscribing the rights of a child born in wedlock to seek such support from the reputed father, 42 Pa. C.S. §6704(b) unconstitutionally deprives an out-of-wedlock child of the equal protection of the laws guaranteed by the equal protection clause of the Fourteenth Amendment. The Pennsylvania Supreme Court's decision in Astemborski v. Susmarski, 502 Pa. 409, 466 A.2d 1018 (1983), upholding the constitutionality

of the statute of limitations under the equal protection clause, mistakenly assessed the validity of the law in light of the considerations propounded by this Honorable Supreme Court in Mills v. Habluetzel, 456 U.S. 91 (1982) and Pickett v. Brown, 462 U.S. 1 (1983).

Additionally, the statute of limitations unconstitutionally deprives out-of-wedlock minor children of their due process rights guaranteed by the Fifth Amendment, insofar as it absolutely bars them from asserting a legal claim for the ongoing and continuing support which they are clearly owed and to which, otherwise, they remain presently entitled through their majority.

ARGUMENT

I. THE SIX-YEAR STATUTE OF LIMITATIONS IN AN ACTION TO ESTABLISH PATERNITY AND SEEK SUPPORT FOR CHILDREN BORN OUT OF WEDLOCK VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the trial court the Appellee in this action raised, as an affirmative defense to the Appellant's Complaint for Support on behalf of her minor daughter, the six-year statute of limitations on such actions brought on behalf of children born out of wedlock. In pertinent part, the statute, at 42 Pa. C.S. § 6704, provides that:

> (b) Limitation of actions--all actions or proceedings to establish the paternity of a child born out of wedlock brought under this section must be commenced within six years of the birth of the child, except where the reputed father shall have voluntarily contributed to the support of the child or shall

> have acknowledged in writing his paternity, in which case an action or proceeding may be commenced at any time within two years of any such contribution or acknowledgment by the reputed father.

The Appellant has acknowledged that the minor child who is the subject of the proceeding at issue was born more than six years prior to the commencement of the action, that the named Defendant was not the Appellant's husband at the time of the child's birth, and that the named Defendant neither voluntarily contributed support to this child nor acknowledged his paternity in writing within the two years preceding the instant action. Notwithstanding the foregoing, however, the Appellant contends that the application of this statute of limitations to her action for support from the Appellee unconstitutionally deprives

her and her child of the equal protection of laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, insofar as the statute applies solely to actions brought by or on behalf of children born out of wedlock, and not to similar actions brought by or on behalf of children born in wedlock.

As is clear from the explicit and unambiguous language of the Pennsylvania statute at issue, 42 Pa. C.S. § 6704(b), an action to establish the duty of support owed to children born out of wedlock is subject to a statute of limitations whereas actions for support for children born in wedlock are not so restricted. Thus, two similarly-situated classes of persons are created and

simultaneously treated with a gross disparity which, despite the recent holding of the Pennsylvania Supreme Court in Astemborski v. Susmarski, 501 Pa. 409, 466 A.2d 1018 (1983), canno pass constitutional muster.

Once a state establishes a judically enforceable right on behalf of children to obtain support from their natural fathers, the Equal Protection Clause prohibits the state from denying the same right to children born out of wedlock, Gomez v. Perez, 409 U.S. 535, 93 S.Ct. 972 (1973). Consequently, where states have imposed temporal limitations upon that right, this Honorable Court has required that the states' traditional interests in preventing stale and fraudulent claims be weighed with great scrutiny

against those constitutionally-protected interests; Mills v. Habluetzel, 456 U.S. 91, 102 S.Ct. 1549 (1982); Pickett v. Brown, 462 U.S. 1, 103 S.Ct. 2199 (1983), in order to determine the constitutionality of such limits.

This Court first enunciated the standard of review for balancing and evaluating these two competing concerns in Lalli v. Lalli, 439 U.S. 359, 99 S.Ct. 518 (1978). There, this Court specifically explained, at 439 U.S. 265, 99 S.Ct. 523, that, "Although . . . classifications based on illegitimacy are not subject to 'strict scrutiny,' they nevertheless are invalid under the Fourteenth Amendment if they are substantially related to permissible state interests." (emphasis supplied).

Subsequently, in Mills and Pickett, supra, this Honorable Court, applying the Lalli standard of review, invalidated a one, and a two year, statute of limitations, respectively, for filing paternity claims on behalf of children born out of wedlock.

In Mills, the Supreme Court emphasized two factors in determining that Texas' one year statute violated the Equal Protection Clause. First, this Court found that the one year period was not sufficiently long to present a reasonable opportunity for interested parties to assert claims on behalf of the child. This Court reasoned that "[f]inancial difficulties. . . ., continuing affection for the child's father, a desire to avoid disapproval of family and community, [and] the emotional strain and confusion" and other problems that often accompany the

birth of an illegitimate child might pose "practical obstacles" to the timely institution of a paternity suit. 456 U.S. at 100.

Secondly, the Court analyzed the potential evidentiary difficulties in proving paternity, and concluded that it could "conceive of no evidence essential to paternity suits that invariably will be lost in only one year, nor is it evident that the passage of twelve months will appreciably increase the likelihood of fraudulent claims." 456 U.S. at 101.

In a concurring opinion joined by three other justices, Justice O'Connor significantly expanded the considerations which she deemed must be examined and weighed in determining the validity of a state's statute of limitations for

paternity actions. First, she noted that states have a number of equally-important yet contervailing interests relating to parternity and support legislation, not just a singular concern for limiting the institution of old cases. Thus, she wrote, "while the state surely has an interest in preventing the prosecution of stale and fraudulent claims, at the same time, it has a strong interest, peculiar to the state itself, in ensuring that genuine claims for child support are not denied." 456 U.S. at 104 (O'Connor, J. concurring).

Next, Justice O'Connor regarded it as significant that a paternity suit was one of the few causes of action in Texas not tolled during the minority of the plaintiff. 456 U.S. at 105. This, of course, meant that Texas had singled out

its "concern" for stale and fraudulent claims to only one category of suits--those unique to children born out of wedlock--in which significant delays might create proof problems. Further, Justice O'Connor noted that the recent scientific advances in blood testing substantially alleviated the state's concern that a defendant could be falsely accused of fatherhood, despite the passage of a number of years since the child's birth, 456 U.S. at 104, n. 2.

Finally, Justice O'Connor noted that "the practical obstacles to filing suit within one year of birth could as easily exist several years after the birth of the illegitimate child. . . . The risk that the child will find himself without financial support from his natural father

seems as likely throughout his minority as during his first year of life." 456 U.S. at 105-106.

In Pickett v. Brown, supra, this Honorable Court unanimously echoed the concerns raised in Justice O'Connor's concurrence in Mills. In Pickett, the challenged Tennessee statute of limitations afforded two years for the institution of a paternity lawsuit. Reviewing its decisions of the previous fifteen years which had assessed the constitutional parameters of statutory classifications based on illegitimacy, this Court unequivocally reaffirmed that the "heightened level of scrutiny" applied to such equal protection analyses. Additionally, the Court reasserted that such analyses must focus upon the "two

related requirements" of Mills: "[1] the period for obtaining parental support has to be long enough to provide a reasonable opportunity for those with an interest in illegitimate children to bring suit on their behalf; and [2] any time limit on that opportunity has to be substantially related to the State's interest in preventing the litigation of stale or fraudulent claims," (emphasis added) 103 S.Ct. at 2204.

In evaluating whether two years afforded constitutionally-ample time in light of the foregoing factors, the Pickett Court agreed with, and adopted, Justice O'Connor's observation in Mills that the emotional strains experienced by a mother and her desire to avoid family or community disapproval "may continue years after the child is born," 103 S.Ct.

at 2206. Consequently, this Court held that the two-year limitations period did "not provide an adequate opportunity to obtain support." 103 S.Ct. at 2207.

In its evaluation of the second prong of the Mills test, the Pickett Court focused upon the fact that the Tennessee statute in question denied most illegitimates' claims because of staleness after two years but nevertheless permitted these "stale" claims to be brought later if a child was likely to be supported by welfare. In those welfare cases, the law permitted claims for support to be filed until the child reached age 18. As the Pickett Court found, this inconsistency in the statute seriously undermined the state's argument that the different treatment accorded legitimate and

illegitimate children was substantially related to a concern to prevent stale or fraudulent claims. 103 S.Ct. at 2207-08 The state's position was further undercut by the Tennessee laws tolling most actions during a child's minority, which essentially overlooked or discounted the evidentiary problems of staleness and fraud which the state claimed to eschew in paternity actions.

Finally, as did Justice O'Connor in Mills, the Pickett Court emphasized that "the relationship between a statute of limitations and the state's interest in preventing the litigation of stale or fraudulent paternity claims has become more attenuated as scientific advances in blood testing have alleviated the problems of proof surrounding paternity actions," 103 S.Ct. 2208.

Following the decision in Pickett, the Pennsylvania Supreme Court specifically held 42 P.S. § 6704(b) to be a valid constitutional limitation on the right of illegitimate children to receive support from their natural parents, in Astemborski v. Susmarski, 499 Pa. 99, 451 A.2d 1012 (1982), vac. 103 S.Ct. 3105, on remand 402 Pa. 409, 466 A.2d 1018 (1983). That decision, upon which the Pennsylvania Superior Court conclusively relied in the instant case, is wrong for a number of significant reasons.

First, to determine whether six years is sufficient time to permit suits to be brought, the Pennsylvania court focused only upon the "birth-related encumbrances" discussed in Mills, which, the court asserted, would be dissipated after the

first several years. 466 A.2d at 1022. However, the problems cited by Justice O'Connor in Mills and reiterated by the Pickett Court are much more complex, and much longer-lived social-economic problems which, as Justice O'Connor stated, "may continue years after the child is born." Mills, supra., 456 at 105 n. 4.

The record of the Clark v. Jeter case, supra., presently pending before the Pennsylvania Superior Court, aptly illustrates this point. Long after the birth of her daughter, the Plaintiff/Appellant remained too terrified of the Defendant--who had physically abused her during her pregnancy because she refused to obtain an abortion--to publicly acknowledge that he was the father of the child. (Transcript of Record, p. 18)

After her fears subsided, the Plaintiff's lack of education and general misapprehension of the legal system prevented the Plaintiff from realizing that filling out papers with the welfare department was not the same thing as filing a complaint for support within the court. (T. pp. 33-34) By the time the Plaintiff was made aware of her error, the statute of limitations had run (T. p. 34). Clearly, in such a situation, the child's right to support is unfairly denied because of the mother's legitimate fears and lack of education.

In Astemborski, the Pennsylvania court further opined that an impermissible prejudice to the defense of a paternity claim would occur after six years because of proof problems. Such proof problems, the court ruled, justified burdening an

illegitimate child's right to seek support from his or her father.

In a footnote, the Pennsylvania court, in an attempt to distinguish Pickett, also suggested that since Pennsylvania generally did not provide for the tolling of statutes of limitations during minority, paternity actions are treated no differently than the "vast majority of actions brought on behalf of a child." 466 A.2d at 1021[12/]

12/ It is significant and noteworthy that subsequent to the publication of Astemborski, the Pennsylvania legislature enacted a statute which, contrary to the contention of the Pennsylvania court, does, indeed, specifically toll all statutes of limitations for actions which a child might be entitled to bring, during and throughout the child's minority; 42 Pa.C.S. § 5544(b) (1985). Obviously, the Pennsylvania court's adherence to this purported analogy no longer remains valid.

Both of these conclusions are fallacious in light of the fact that Pennsylvania allows paternity adjudications without any time limitations whatsoever in all sorts of cases except where a child born out of wedlock is seeking support from a father. For instance, the intestacy law, 20 Pa.C.S. § 2107(c)(3), allows a court disposing of a decedent's estate to establish that a child born out of wedlock is the child of his father "if there is clear and convincing evidence that the man was the father of the child, which may include a prior court determination of paternity." The legislature has established no limit at all to the number of years after which Pennsylvania considers the evidence too stale or the likelihood of fraudulent claims too great

to allow a court to determine parentage under this heirship statute.

Likewise, a father may choose, voluntarily, to obtain a judicial declaration that he is a child's parent, without any limit whatsoever to the time in which he seeks such a determination. In In Re Mengel, 429 A.2d 1162 (Pa. Super. 1981) the Pennsylvania Superior Court held that a person claiming to be a father could utilize the Declaratory Judgment Act to seek such a determination and could, as part of this suit, obtain blood tests under the Uniform Act on Blood Tests to Determine Paternity. In passing, the Mengel court also noted that the father could similarly raise the issue of paternity in a suit to obtain visitation rights or to amend the child's birth

certificate.[13/] 429 A.2d at 1167.

There exist no statutes of limitations pertaining to the foregoing sorts of paternity actions. Yet these actions similarly and necessarily involve and decide questions of fatherhood which may arise more than six years after the birth of the subject child. Just as this Honorable Court comprehended in Mills and Pickett, such legislative inconsistencies

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13/ In Commonwealth ex rel. Gonzales v. Andreas, 360 A.2d 416 (Pa. Super. 1976), the Superior Court specifically criticizes the Uniform Act on Blood Tests to Determine Paternity [28 P.S. §307] because it "does not make any provision for a particular prescriptive period in which a putative father denying paternity must commence suit." 369 A.2d at 419. When 28 P.S. § 307 was refashioned at 42 Pa. C.S. § 6131 et seq., it is noteworthy that the Legislature once again declined to set a limit on the period of time in which the blood tests necessary to determine parentage could be ordered by a court.

seriously undermine Pennsylvania's position, and the Astemborski court's conclusion, that proof problems become too great to determine paternity more than six years after the birth of the child. See, also, Commonwealth v. Goldman, 184 A.2d 351 (Pa. Super. 1962), where the Superior Court held that a father has the right to dispute parentage and to have the benefit of blood tests to do so at any time provided he is not barred by laches or estoppel.

Indeed, there simply does not exist any justification for this inconsistent application which could explain why the identical evidence is overly stale after six years in one sort of case but not in another.

In contrast to the holding in Astemborski, cases in other jurisdictions have appropriately recognized and correctly applied the principles adopted in Mills and Pickett. In State of Oregon Adult Family Services v. Bradley, 666 P.2d 249 (Or. 1983), the Oregon Supreme Court invalidated, on equal protection grounds, a six year statute of limitations in paternity actions. That decision was, in part, based upon the fact that, in Oregon heirship proceedings, "paternity may be established at any time during the life of the child without regard to the amount of time since the child's birth." 666 F.2d 252. Therefore, the Oregon court concluded, the six year limit in paternity support cases was arbitrary and had no substantial relationship to the problems

of stale proof and fraudulent claims. Weighing the value of modern blood tests against the evidentiary problems caused by trying stale claims, the court there wrote "Although the proof of paternity cases may become more difficult with the passage of time, that possibility does not condone the total preclusion of illegitimate children beyond a certain age from attempting to ascertain their father's identity." 666 P.2d 252.

A number of other state courts similarly have invalidated, as unconstitional denials of equal protection, their statutes of limitations in paternity proceedings for children born out of wedlock: Florida Department of Health and Rehabilitation Services v. West, 378 So.2d 1220 (Fla. 1979) (Florida's four year statute

unconstitutional denial of equal protection); Callison v. Callison, 687 P.2d 106 (Okla. 1984) (Oklahoma's three year statute denies equal protection); Kentucky v. Young, 661 S.W. 2d 787 (Ky. 1983) (three-year statute unconstitutional); Moore v. McNamara, 40 Conn. Sup. 6, 478 A.2d 634 (1984) (Connecticut's three-year statute invalid); State ex. rel. S.M.B. v. D.A.P., 284 S.E. 2d 912 (W. Va. 1981) (West Virginia's three year statute unconstitutional); Cogdell v. Johnson, 46 N.C. App. 182, 264 S.E. 2d 812 (1980) (invalidating North Carolina's three year statute); Patricia R. v. Peter W., 120 Misc. 2d 986, 466 N.Y.S. 2d 994 (N.Y. Fam. Ct. 1984), (New York's five year statute is adequate under first requirement of Mills but fails the second).

This Honorable Court is respectfully urged to carefully scrutinize the logic of the Astemborski court's analysis in upholding the statute of limitations in question, particularly in light of the Pennsylvania cases and statutes cited supra, which, in contrast to 42 Pa. C.S. § 6704(b) impose no similar six-year legal impediment upon the institution of an action to determine the paternity of a minor child. Surely, the Astemborski court's conclusion that the statute of limitations at issue "is substantially related to a legitimate state interest, viz., the prevention of stale or fraudulent paternity claims," can hardly be deemed tenable when neither the Pennsylvania legislature nor the Pennsylvania courts have similarly precluded paternity

adjudications six years after an illegitimate child's birth, in the other sorts of legal proceedings delineated supra.

Instead, this Honorable Court should reflect upon the keen observations of the Oregon Supreme Court in Bradley, supra, quoting from Cogdell v. Johnson, supra., that:

> The mere passage of a certain amount of time before the custodial parent sues for support has no logical connection with whether the noncustodial putative parent is or is not the actual parent. The absurdity (and tragedy) of the situation becomes manifest when we consider that under the statute, an out of wedlock parent could voluntarily support his or her child from the time of birth to age ten; the custodial parent could neglect or not need to seek support for two years but desperately need it when the child turns twelve; and at that point the child would be precluded from ever establishing parentage or receiving support from its (sic) parent.

Moreover, the Astemborski court's apparent presumption, without discussion, that a paternity action filed more than six years after an illegitimate child's burth will amount, per se, to a "stale or fraudulent paternity claim," ignores the fact that, unlike other causes of action which are time-barred by statutes of limitations, the obligation to support one's child is continuing and ongoing. Thus,

> An action to determine paternity is not a stale claim when employed as a prerequisite to an illegitimate's obtaining of continuing or recurring support. This right has never become dormant, and for the statute of limitations to act to preclude this right on the basis that it is stale is illogical. (emphasis added)

Bradley, supra, at 254, quoting from State Department of Health, supra. at 1227.

When 42 Pa. C.S. § 6704(b) is evaluated within the context of the foregoing considerations--matters which, apparently, were not explored in Astemborski--then the illogic of the Pennsylvania Supreme Court's premises and conclusions in Astemborski becomes manifest. Consequently, the equal protection analyses propounded by the Astemborski court should be reconsidered by this Honorable Court. The decision of numerous other courts which have assessed their states' statutes in light of Mills and Pickett make clear that the instant statute of limitations likewise unconstitutionally violates the Fourteenth Amendment to the United States Constitution.

II. THE IMPOSITION OF A STATUTE OF LIMITATIONS IN ACTIONS TO ESTABLISH PATERNITY AND SEEK SUPPORT FOR MINOR CHILDREN BORN OUT OF WEDLOCK DEPRIVES MINOR CHILDREN OF DUE PROCESS AS GUARANTEED BY THE UNITED STATES CONSTITUTION

By operation of both long-established statutory and common law, minor children born in or out of wedlock are owed a continuing duty of support by their natural or adoptive parents, or their legally-responsible guardians, throughout the course of their minority. However, rather than affording an affected minor child the right to personally file an action against a parent who fails to meet this legal responsibility, Pennsylvania Rules of Civil Procedure, 1910.3, and 1910.4, by virtue of 42 Pa.C.S. § 6704(a), require that the complaint necessary to commence an action for such support "shall be brought

. . . on behalf of a minor child by a person having custody of the minor. . . (emphasis supplied). Thus, although a minor child's right to support from his or her parents continues throughout the child's minority, that minor child may not, independently, initiate an action to secure such support from a negligent non-custodial parent.

Consequently, in cases such as that now before the bar, the custodial parent's failure to file a support action on behalf of a minor child born out of wedlock within the time prescribed by § 6704, serves to foreclose absolutely the minor child's right to seek the support which his or her parent is legally obligated to provide.

Such a result clearly deprives the minor children affected in such cases of

their substantive right to support, by depriving them of their due process rights to even assert a legal claim for the support which they are clearly owed.

In finding a similar statute of limitations unconstitutional as violative of a minor child's due process guarantees, the Texas Court of Civil Appeals, in In Re: Miller, 605 S.W. 2d 332 (1980) at 336, stated:

> ...To hold otherwise would allow the illegitimate's rights to support to be waived by the mother. Not only would this result in unequal protection under the law...but such a denial would violate the illegitimate's constitutional rights to due process...the law does not permit one to forfeit another's rights. The right of an illegitimate child to assert a claim for parental support is too fundamental to permit its forfeiture by the mother's failure to timely institute a filiation proceeding (emphasis added).

See, also, Kaur v. Singh Chawla, 11 Wash. App. 362, 522 P.2d 1198, 1200 (1974), and cases cited therein. Cf; Huss v. DeMott, 215 Kan. 450, 524 P.2d 743 (1974), where the Supreme Court of Kansas ruled that a similar statute of limitations for instituting paternity proceedings applied only to statutory actions by mothers and consequently did not limit the time in which children born out of wedlock could bring actions for support, themselves. In that case, the court adopted the reasoning that:

> A sufficient reason for holding parents to be under a legal obligation, apart from any statute, to support their legitimate child while it is too young to care for itself, is that the liability ought to attach as part of their responsibility for having brought it into being. If that reason is not found convincing,

> it would be useless to seek others. And it does not in the least depend for its force upon the fact that the parents married to each other, but is equally persuasive where that is not the case....
>
> We do not think the legislature should be regarded as intending to relieve the father from this obligation to the child by the enactment of the statute above referred to, which authorizes the mother of an illegitimate child, if she sees fit, to maintain an action for her benefit in the name of the state against the putative father, and provides for the enforcement of a judgment by imprisonment.... It would obviously be inadequate to cover the entire field of paternal liability, since the mother might not care to institute such a proceeding, or might die without instituting it. The measure is one providing machinery for the enforcement of a duty already existing rather than one creating a new obligation. Parental liability for the support of legitimate children did not originate with the statute [of limitations]

imposing punishment for a default in that respect.

524 P.2d at 746

Cf. Doak v. Mibauer, 216 Neb. 331, 343 N.W.2d 751 (1984), where the Nebraska Supreme Court upheld the constitutionality of Nebraska's four-year statute, precisely because the statute barred only the rights of the adult mother--and not the minor child--to file suit beyond the statutory time limit. On that basis, alone, the Nebraska Supreme Court held that no due process violation existed.

In the instant case, the parent's statutorily-mandated legal obligation to provide support exists, and continues to exist, well beyond the six-year statute of limitations imposed upon the paternity action which may become a necessary

prerequisite to the pursuit of the otherwise legally-permissible action for child support. Thus, by precluding an illegitimate child's right to seek an adjudication of paternity, the statute of limitations simultaneously bars the child's rights to ever seek and obtain what still remains and continues to be the child's legal right to seek and obtain.

In the case at bar, a determination that the Appellant's minor child will never be permitted to seek and obtain support from her father solely because her mother failed to initiate the appropriate legal action within the time afforded by the challenged statute, would deprive that child of the substantive right to support to which she otherwise would be entitled under Pennsylvania law, without affording

her an oportunity to utilize the legal process available and necessary in order to secure that right. Such an outcome conflicts with the due process clause of the Fifth, as applicable by the Fourteenth Amendment. Thus, insofar as § 6704 is deemed to require such a constitutionally unacceptable result, that portion of the Pennsylvania Support Proceedings Act must be held unconstitutional.

CONCLUSION

For all the foregoing reasons, this Honorable Court should reverse the Opinion and Order of the Pennsylvania Superior Court, declare that 42 Pa.C.S. § 6704(b) unconstitutionally violates the Fifth and Fourteenth Amendments to the United States Constitution, and reinstate the instant action for support against the Appellee.

RESPECTFULLY SUBMITTED:

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